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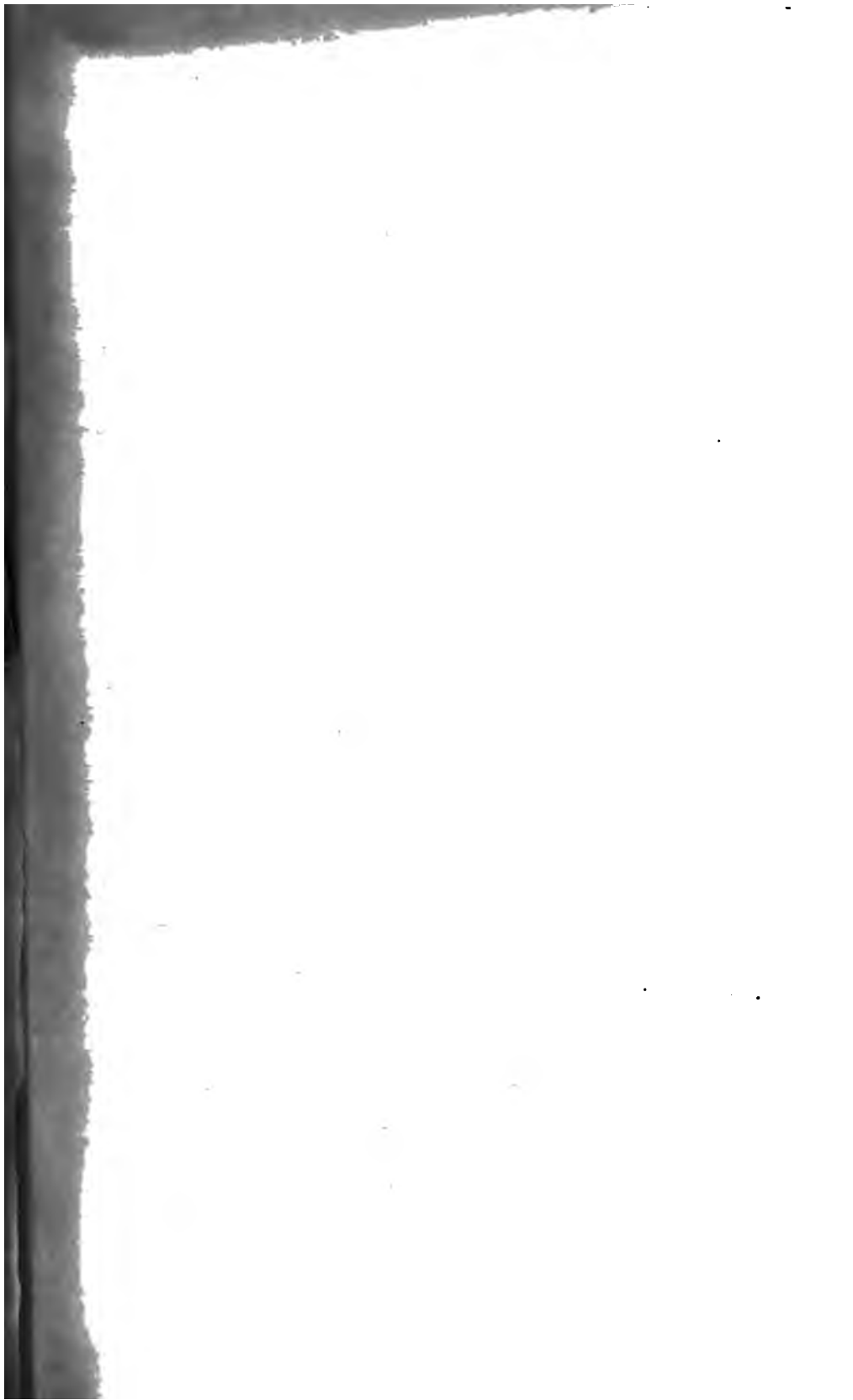
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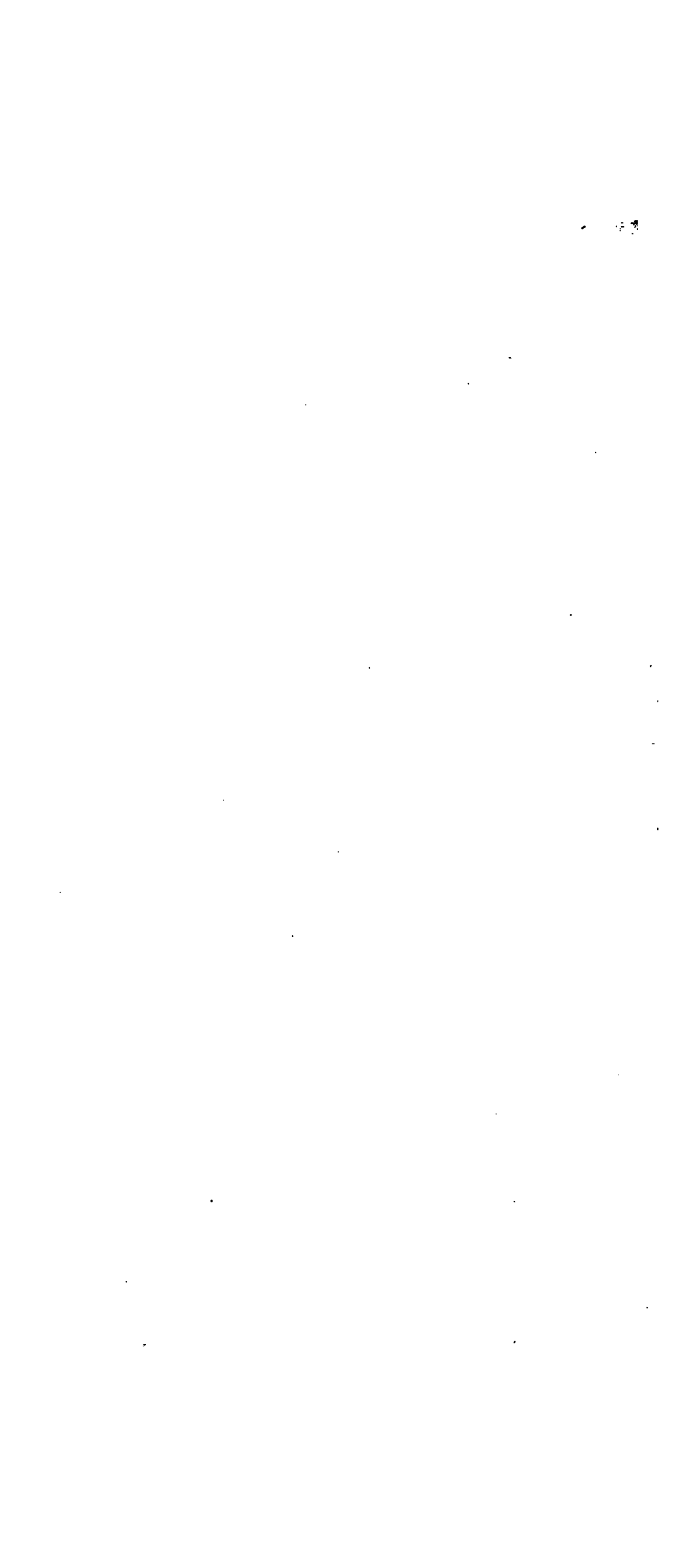
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

VOL. II.

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R E P O R T S
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY
DURING THE TIME OF
LORD CHANCELLOR BROUGHAM
AND
SIR JOHN LEACH,
MASTER OF THE ROLLS.

BY
JAMES W^M MYLNE, AND BENJAMIN KEEN, Esqs.
BARRISTERS AT LAW.

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LORD BROUGHAM and VAUX, *Lord Chancellor.*

SIR JOHN LEACH, *Master of the Rolls.*

SIR LAUNCELOT SHADWELL, *Vice-Chancellor.*

SIR WILLIAM HORNE, } *Attorneys-General.*
SIR JOHN CAMPBELL, }

SIR JOHN CAMPBELL, } *Solicitors-General.*
SIR CHARLES C. PEPYS, }

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ERRATUM.

Page 487. in the marginal note, for " Defendant " read " Plaintiff. "

MEMORANDA.

On the 23d of *December* 1834, Lord *Lyndhurst* resigned the office of Lord Chief Baron of the Exchequer, and was succeeded in the same by Sir *James Scarlett*, Knight, one of his Majesty's Counsel, who was shortly afterwards created a Peer by the title of Baron *Abinger*, of *Abinger* in the county of *Surrey*, and of the city of *Norwich*.

About the same time, Sir *Edward Burtenshaw Sugden*, Knight, one of his Majesty's Counsel, was appointed Lord High Chancellor of *Ireland*, on the resignation of Lord *Plunkett*; and *Frederick Pollock*, Esq., one of his Majesty's Counsel, and *William Webb Follett*, Esq., were respectively appointed his Majesty's Attorney-General and his Majesty's Solicitor-General, on the resignations of Sir *John Campbell*, Knight, and *Robert Monsey Rolfe*, Esq. *Frederick Pollock* and *William Webb Follett*, Esqrs., respectively received the honour of knighthood upon their appointment.

On the 11th of *January* 1835, Sir *William Elias Taunton*, one of the Justices of the Court of King's Bench, died; and *John Taylor Coleridge*, Esq., Serjeant-at-law, was appointed to the vacant office, and was thereupon knighted.

In *Michaelmas* vacation, *Daniel Wakefield*, *Henry John Shepherd*, *Walker Skirrow*, *Christopher Temple*, *John Miller*, *Richard Torin Kindersley*, *Edward Jacob*, *James Wigram*, and *Fitzroy Kelly*, of *Lincoln's Inn*, Esqrs.; *William Burge*, *George Spence*, and *Thomas Joshua Platt*, of the *Inner Temple*, Esqrs.; and *Charles Henry Barber*, of *Gray's Inn*, Esq., were appointed his Majesty's Counsel; and took their seats within the bar in the following *Hilary Term*.

On

R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

1833.

LORD v. KELLETT.

Nov. 5.

THIS was an application on behalf of a person of the name of *Lord*, that his name might be struck out as one of the plaintiffs in the bill, and that his costs might be paid by his solicitor personally, as having instituted the suit without due authority.

A solicitor ought to have a special authority from his client for instituting a suit, but such authority need not be in writing.

Mr. *Pepys* and Mr. *Walker*, for the motion, contended that, as the affidavit of the Plaintiff positively denied that he had ever given the solicitor any specific instructions to file the bill, it was unnecessary to enter into an examination of the facts sworn to on behalf of the solicitor, and which, it would be argued, amounted to a sufficient verbal authority. It was the duty of the solicitor, acting upon the rule to be deduced from the language of Lord *Eldon* in *Wilson v. Wilson* (a), and *Wright v. Castle* (b), to have protected himself by obtaining

(a) 1 J. & W. 457.

(b) 3 Mer. 12.

1833.
 {
 LORD
 v.
 KELLETT.

ing from his client an authority in writing; and, as he had not done so in the present instance, he must take the consequences.

Sir *E. Sugden*, *contra*, insisted that the construction attempted to be put upon Lord *Eldon's dictum* was unreasonable in itself, and would, if adopted, be an encouragement to the grossest fraud and injustice.

The LORD CHANCELLOR said it was true that a solicitor must, for the purpose of instituting a suit, receive specific authority from his client; but it had never been decided that such authority might not be by parol. The rule now contended for,—that wherever the Plaintiff denied the fact of the retainer, the solicitor was bound to produce an authority in writing,—was not a fair inference from the language of Lord *Eldon*; much less was it established by the cases referred to. It would be necessary for him, therefore, to go into the affidavits.

Nov. 9.

The LORD CHANCELLOR stated that he adhered to the opinion he had already expressed,—that the authority for filing a bill might be by parol as well as in writing, and that, in the former case, it might be proved by circumstances and by the subsequent conduct of the party. The circumstances, however, which were disclosed on these affidavits did not, on the whole, appear to establish a sufficient authority in the present instance; and the application of the Plaintiff must, therefore, be granted.

In

CASES IN CHANCERY.

3

In the cases of *Wiswold v. Goetze* and *Simpson v. Jones*, which came on for argument a few days afterwards, upon motions involving the same question, respecting the sufficiency of the retainer given by the plaintiffs, the Lord Chancellor recognised and acted upon the principles previously laid down in *Lord v. Kellett*.

1833.
 LORD
 v.
 KELLETT.

Ex parte EVELYN.

Nov. 12. 19.

IN this case administration had been taken out to the personal estate and effects of the lunatic so long as the lunatic's next of kin continued to be of unsound mind; and the administratrix had, in the usual form, given bail, which had justified in double the value of the estate. The petition of the administratrix prayed a transfer of the funds belonging to the lunatic's estate into the names of the administratrix and her two bail.

Where the next of kin of a deceased lunatic was of unsound mind, though not so found by inquisition, a transfer of the lunatic's personal estate was directed to be made to the person to whom administration *durante animi vitio* of such next of kin had been granted, agreeably to the practice of the Ecclesiastical Court.

Mr. Ching, in support of the petition.

The LORD CHANCELLOR ordered the petition to stand over, that he might make inquiry as to the form of the administration which had been granted during the incapacity of the next of kin, against whom no commission had issued.

The LORD CHANCELLOR this day read the following communication, which he had received from Dr. Lushington.

Nov. 19.

B 2

"It

1833.

Ex parte
EVELYN.

"It is the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so has not been found a lunatic by inquisition. When such a case occurs, the Ecclesiastical Court requires affidavits, stating the fact of lunacy, and that no inquisition has been had, and, of course, no committee appointed. The Court then grants administration to the next of kin of the lunatic, for the use and benefit of the lunatic pending the lunacy, and it requires sureties in double the amount of the property, and such sureties must justify.

"Such is the practice of the Court; and the reason I apprehend to be this, that, if such grants were not made, either the property might not be administered at all, or be administered by a creditor; or that parties might be compelled, in cases where it was neither necessary nor expedient, to apply for commissions of lunacy, in order to get a committee appointed, who might take the administration. I believe, too, that another reason might be assigned; viz., that there are cases in which the Chancellor might not deem it necessary to grant a commission, though satisfied of the unsoundness of mind. These grants are called by *Oughton*, administrations *durante corporis aut animi vitio*. (a) The power of the Ecclesiastical Court to grant them is recognised in many cases, particularly in *Hills v. Mills* (b) and the cases there quoted; and I believe that no exception has been made in cases where the person has not been previously found a lunatic by inquisition. Indeed, in poor cases, this would be impracticable.

"In *Re Crump* (c) such administration was granted during the incapacity of an executor. In *Re Handstone*

(a) *Ord. Jud.* 324, n.

(b) 1 *Salk.* 56.

(c) 3 *Phill.* 497., and see *Re Hinckley*, 1 *Hagg.* 477.

stone, which was an application of mine, it was refused, because I asked for the grant without justifying security."

1893.
Ex parte
EVELYN.

The LORD CHANCELLOR, upon the result of the preceding communication, directed that the transfer of the fund should be made to the administratrix only, and not to her bail.

JENKINS v. PARKINSON.

Nov. 5. 25.

JENKINS, who was lessee of certain lands at *Lisson Grove*, under Mr. *Portman*, leased a portion of the lands to Dr. *Cockburn* by an indenture of the 4th of July 1812, wherein he also covenanted that he would not, during the term, erect or suffer to be erected any buildings whatever on that part of the property lying eastward of the lands thereby demised, under the penalty of 5000*l.*, to be paid to Dr. *Cockburn*.

Where a covenant in an agreement for a lease was broken, and a verdict obtained for 1500*l.* as damages for the breach, but the Plaintiff in the action died before the judgment was perfected, so that the damages were lost at law, the Court, on a bill by his representatives for specific performance of the agreement, refused a writ of *ne exeat regno* for the amount.

On the 3d of August 1825, *Jenkins* agreed to demise to *Parkinson* all that part of the premises comprised in *Portman's* lease, which was not included in the lease to *Cockburn*; subject to a covenant, whereby *Parkinson* undertook to indemnify *Jenkins* against any breach of the covenant contained in the lease to *Cockburn*.

Parkinson entered into possession under this agreement, and caused houses to be built upon the land referred to in the covenant with Dr. *Cockburn*, whereupon the latter brought his action against *Jenkins*. That action was defended by *Parkinson*, who suffered a verdict to be taken against him for 5000*l.*, subject to a

1833.
 {
 JENKINS
 v.
 PARKINSON.

reference, whereby the damages were eventually reduced to 1500*l.*, together with the sum of 400*l.* for costs.

Jenkins was afterwards obliged to pay the 1500*l.*; and not being able to obtain the money from *Parkinson*, he brought his action, and obtained a verdict over against him for 1500*l.* as damages, and 400*l.* as costs, subject to be reduced on taxation.

Jenkins shortly afterwards died, and the costs not having been then taxed or the judgment perfected, in consequence, as was alleged, of the conduct of *Parkinson's* attorney in keeping back the papers, his personal representatives found themselves unable at law to take advantage of the verdict in his favour, and they thereupon filed their bill against *Parkinson* for a specific performance of the agreement of the 3d of *August*, 1825. The bill set out very fully the circumstances already stated, and it also prayed that in the meantime, and till a specific performance should be decreed, a writ of *ne exeat regno*, marked with the sum of 1500*l.*, might issue against the Defendant.

On an application made in the vacation, the Lord Chancellor granted the writ, and the Defendant having subsequently put in his answer, wherein he distinctly and positively denied the allegations against him with respect to the delay in perfecting the judgment, a motion was now made on his behalf that the writ of *ne exeat* might be discharged.

Mr. *Peggs* and Mr *Crembie*, for the motion.

It is an established principle that a *ne exeat* will not be granted except for an equitable debt actually due;
King

King v. Smith (a), Ex parte Duncombe (b), Amsinck v. Barklay (c), Whitehouse v. Partridge (d); whereas here the alleged debt being the amount of damages recovered in an action for the breach of covenant, it is a purely legal demand, and if lost by the death of the Plaintiff at law, before the judgment was perfected, may still be recovered by a new action. *Blaydes v. Calvert (e)*, where a writ of *ne exeat* was refused on a bill for specific performance of an agreement to give a bill of exchange to secure the debt of a third person, is exactly in point. The accidental circumstance by which the effect of the verdict has been lost in this instance does not give a jurisdiction to the Court, and even if it did, that would not alter the legal character of the debt.

1833.
JENKINS
v.
PARKINSON.

Upon the frame of the present bill, besides, it is quite impossible to sustain the writ. The Defendant has never accepted a lease, and the matter still rests *in fieri*, the contract being for a future lease, in which a covenant of indemnity is agreed to be inserted. The Plaintiffs come into equity for a specific performance of the agreement; in other words, to have a lease executed which shall contain the particular covenant in question. They do not ask of this Court to take upon itself the jurisdiction of assessing and awarding damages, a jurisdiction which their counsel well knew could not be maintained. They confine themselves simply to the proper equitable relief; the only relief which they can obtain upon this bill, and which they will obtain, almost as of course, by a decree referring it to the Master to settle the terms of a lease upon the basis of the agreement. But though such is the frame of the suit,

(a) 1 *Dick.* 82.

(b) 2 *Dick.* 503.

(c) 8 *Ves.* 594.

(d) 3 *Swan.* 365.

(e) 2 *J. & W.* 211.

1893.
 {
 JENKINS
 v.
 PARKINSON.

suit, the writ proceeds on a very different supposition — that this Court will give damages for the breach of covenant ; and accordingly the writ is marked with the sum which the verdict of a jury had already awarded on that account. The payment of that sum, however, forms no part of the relief sought by the bill ; nor could the bill be so framed as to include such relief without becoming open to a demurrer ; for the cases of *Denton v. Stewart*, and *Greenaway v. Adams*, in which this Court has taken upon itself to assess and award compensation in the nature of damages for breach of contract, have been over-ruled by Lord *Eldon* in *Todd v. Gee*, and are no longer law.

Sir *E. Sugden* and Mr. *Stuart*, *contra*.

According to the agreement between *Jenkins* and *Parkinson*, the latter was to accept a lease containing a covenant to indemnify *Jenkins* against his liabilities to *Cockburn*. The Plaintiffs, as representing *Jenkins*, have now an indisputable right to call upon *Parkinson* for a specific performance of his agreement ; and their bill is properly framed for this object. But previously to the filing of the bill, a breach had been committed in one respect against the covenant in the contract, (which, be it observed, is large enough to cover every possible breach), and as the damages have been ascertained by means of an action, and as a complete performance *in specie* is no longer possible in respect of the covenant, which was broken before the Court was called to interpose, a court of equity will give, as a part of the relief incident to the suit, and as the best substitute for the thing actually contracted for, the amount of compensation declared by a jury to be a just equivalent for the injury sustained. The Defendant is bound, and in equity compellable, specifically to perform his contract

in

in every part: one material part of the contract is the covenant under which the Plaintiffs are entitled to an indemnity from *Parkinson*, as well in respect of the breach that has already taken place, as of all future breaches of the covenant; and the value of the indemnity in the former case, which forms an integral portion of the specific performance to be decreed, is exactly measured by the amount of the damages assessed at law; and the payment of that amount, therefore, is substantially included in the relief which is prayed by the present bill. The circumstance that a verdict has been recovered for the 1500*l.* does not change the nature of the debt. That debt is equitable merely, and ought to be considered as standing on the same footing with the price agreed to be given for the purchase of an estate. It will hardly be contended that a vendee may not file a bill in equity for the amount of the purchase money, and obtain a *re exeat* on such a bill, although all the specific performance he could ultimately have would be simply the payment of the money. (a)

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JENKINS
v.
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It is an error to suppose that there is any general rule forbidding a party to come into equity for damages. Besides the familiar instance of a bill by the vendee of an estate, there are several cases, like *Denton v. Stewart*, where the Court, in order to do complete justice between the parties, and avoid the necessity of sending them to law, has directed references to the Master, for the purpose of assessing the amount of compensation; the principle being that where the main object is strictly of equitable cognisance, the Court will not give the remedy by piecemeal, but will itself deal with the whole subject-matter of the suit. All the cases referred to on the other side

(a) *Raynes v. Wyc*, 2 *Mer.* 472. *Boehm v. Wood*, 1 *T. & Russ.* 352.

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side are cases where there was a good debt at law, and therefore they do not touch the present question.

The LORD CHANCELLOR.

The bill filed by the executors has plainly, though covertly, this object—to obtain the costs of their testator's action against *Parkinson*, which costs are otherwise likely to be lost. The Plaintiffs have, by the death of *Jenkins*, lost the benefit of his verdict, and though a new action may be brought at law upon the covenant of indemnity, and though in that they will be enabled to recover the sum of 1500*l.* paid by the testator on Dr. *Cockburn's* action against him, together with the costs of that action, they will not be able to recover the costs of the action brought by the testator against *Parkinson*, and in which the judgment was not perfected when *Jenkins* died. Whether or not the Court of King's Bench would allow them to enter up judgment *nunc pro tunc* upon this verdict, if they could prove that the delay and loss of the judgment were occasioned (as is alleged) by *Parkinson's* attorney wilfully keeping back the papers, and obstructing the taxation of costs, is another question; though I incline to think that no such relief could be given them, and that therefore the costs of the testator's action are gone.

But have the executors a right on that account to come here, and having—whether by the testator's laches, or through the conduct of the Defendant's attorney, is immaterial—lost the fruits of their testator's verdict, to call upon this Court to treat their claims as equitable, and give them relief? It may be a sufficient answer to say that such is not the prayer of their bill. The bill sets forth the agreement with *Parkinson*, whereby the latter undertook

took to build upon the demised premises, and to save the testator harmless against the breach of covenant which such building might occasion, and it prays a specific performance of the agreement. To what would that performance amount? To compelling *Parkinson* to build, and also to save harmless the representatives of *Jenkins*: in other words, to perform his covenants. The Court will compel him to execute a lease with covenants, which he had agreed to make; but not to do the thing which those covenants had bound him at law to do, under pain of being sued for the breach. But even if the Court could compel him to the thing covenanted, there is no covenant to pay that which has been lost by the testator's death, viz. the costs of his action. If there were any such covenant, the executors would not be remediless at law; they could proceed for those costs as well as for the 1500*l.*, and the costs of the action against *Jenkins*.

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But suppose the bill had, as has sometimes been attempted, distinctly prayed performance, or compensation for non-performance, or had prayed compensation for the breach, under the covenant of indemnity, it would then have asked that the damages might be ascertained by an issue, or by a reference to the Master, which was the course pursued in *Denton v. Stewart* and *Greenaway v. Adams* (a). The Plaintiffs cannot be in a better position than if their bill had taken that form; for, unless the damages, or, as they would call it, the compensation, to give it a less legal and more equitable aspect, can be so ascertained, the relief cannot be awarded.

In *Todd v. Gee* (b) the question was raised, whether a party was entitled to satisfaction by way of damages for the non-performance of an agreement, to compel the execution

(a) 12 Ves. 395.

(b) 17 Ves. 273.

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execution of which the suit was instituted, and Lord *Eldon* there held, that, unless in very particular circumstances, the party was not so entitled. His Lordship did not, in express terms, over-rule *Denton v. Stewart*, but he did every thing short of denying it to be law; and it was strongly represented at the bar to be a decision made under the pressure of strong claims of justice, but one which should have been forgotten as soon as it was pronounced. In *Greenaway v. Adams* (a), it was admitted to be the solitary authority for the point, and though it was there followed, because the Master of the Rolls said he would not over-rule what Lord *Roslyn* had decided, yet he most reluctantly adopted it; and in a subsequent case (b), expressing the great doubts he had felt of its authority in *Greenaway v. Adams*, he refused to follow it a second time. The current of all the previous authorities against it, to which Lord *Eldon* refers in *Todd v. Gee*, may therefore be considered as restored after a temporary and dubious interruption, and it may now be affirmed that those two cases are no longer law.

But even if they were law, and if this Court, entertaining such a suit, could refer it to the Master to ascertain the compensation due for non-performance of an agreement, or for breach of a covenant, it by no means follows that a *ne exeat* should issue on the filing of the bill. For what sum is the writ, in such a case, to be marked? This question occurs in the outset: and, as was said by Lord *Thurlow* in another case (c), the impossibility of answering it in any way but one,—that the sum must be left to the discretion of the Court,—seems to be an insurmountable objection. Nor will it do to say that 1500*l.* were found due by a jury.

(a) 12 *Ves.* 395.(c) *Coglar v. Coglar*, 1 *Ves.*(b) *Gwillim v. Stone*, 14 *Ves.* jun. 94.

jury. That sum was found due by way of damages; and the Court, if it has jurisdiction at all, must begin the inquiry as if the matter were fresh, must satisfy itself in the usual way, and cannot assume that the compensation awarded before was the just measure of the injury sustained.

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But is it necessary to decide, in this stage of the proceeding, whether or not the relief sought is within the province of this Court? If it be not, *cadit questio*. But, though it be, has the party a right to the writ he has obtained? I hold that, where the equity is clear, though the facts may be in dispute, the allegation of the debt on oath, or the swearing to belief of a balance due, may entitle the party to a writ, in order that he may hold the debtor to bail; but that, where the equity is matter of grave doubt, however specific his allegation of debt may be, he shall not, generally speaking, have his writ; at least, I am not aware of a *ne exeat* having been issued under any such serious doubts of the equitable jurisdiction.

But there is here a consideration which disposes of the case at once. It is not denied that the party has his remedy at law. The verdict obtained is gone—gone, it may be, by the laches of the Plaintiff in the suit, or it may be by the alleged contrivance of the Defendant's attorney; although, it may be observed, in passing, that no such contrivance could have eluded the justice of the Court of King's Bench for six hours, had the Plaintiff used due diligence. However, be the fault where it may, the verdict is gone, and the Plaintiff's executors cannot use it. They may, therefore, bring an action again; and whether they can hold the Defendant to bail or not, is immaterial, though it is not said why they cannot. If he has already been arrested, that
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of itself is a conclusive answer to the application for a *ne exeat*; if not, no reason is given why he may not be arrested now in a new suit. But the writ is strictly confined to cases where the party has no remedy at law, unless in the excepted cases of a decree obtained for alimony, and of a balance sworn to upon an account. All the authorities are against stretching this exception. In *Raynes v. Wyse* (a), Lord Eldon plainly considered that he could not grant the writ on allegation of a sum due on an agreement, the performance of which was resisted, although he decided upon another point,—the previous holding to bail at law. In *Ex parte Duncombe* (b), the demand being legal, though there was an obstacle in the way of suing at law, the writ was refused. So it was in *Gardner's* case (c), where the demand was legal; but the party could not be held to bail. In *Blaydes v. Calvert* (d), where the suit was for performance of an agreement to give security for a third person's debt by way of acceptance for a given sum, Lord Eldon after full consideration refused the writ. There, as here, it was suggested, that the party could not be held to bail at law; but Lord Eldon said that was no matter for his consideration. It is needless to go through the other cases, which are more familiar; but two valuable notes of Lord Eldon's remarks on the subject,—one in *Pares's* case, in 1801, communicated by Mr. Bell, the other in *Butler v. Dorant*, in 1809, communicated by Mr. Cooke,—are to be found in the last edition of Mr. Beames's treatise (e); and they shew the clear opinion of that most learned Judge to be against issuing the writ in circumstances much more favourable, and much more akin to the ordinary case, than those alleged upon the present occasion.

The

(a) 2 Mer. 472.

(b) 2 Dick. 503.

(c) 15 Ves. 444.

(d) 2 J. & W. 211.

(e) Beames's View of the Writ of *Ne Exeat Regno*, pp. 47, 52.

The order must, therefore, be discharged. But, considering the length of time that the Defendant has delayed making this application, and the great hardship of the Plaintiffs' case, who must needs lose their costs at law of the second action, I shall direct the costs of the motion to be costs in the cause.

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THE will of *William Mitchell* contained, among others, the following bequest:—“ I give and bequeath to my nieces *Catherine* and *Mary*, the sisters of the said *David* and *John Home*, the sum of 2000*l.* sterling each, when and if they should attain their ages of twenty-one years, and which said legacies to my said two nieces I give to them for their and each of their own sole and separate use, free from the debts or control of their or either of their husbands; and in case of the death of my said nieces or either of them leaving children or a child; I give and bequeath the share or shares of such of my said nieces or nieces so dying unto their or her respective children or child.” The residuary clause of the will gave the residue of the testator's personal estate to trustees, upon trust for his nephew *William C. Macpherson*, to be transferred and paid to him when and if he should attain the age of twenty-one; and it then proceeded in these words:—“ And in case of his death under that age, then to my said nephews *David* and *John Home* and to my said nieces *Catherine* and *Mary Home*, in equal shares and proportions; the shares of my said nieces to be enjoyed by them respectively for their respective lives for their own sole and separate

Bequest to a female when and if she should attain twenty-one, to her sole and separate use; and in case of her death, leaving children, her share to go to her children: Held, to vest an absolute interest in the legatee on her attaining twenty-one.

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use, free from the debts or control of their respective husbands, and on their death the share of each of them to go to their respective children; the children of each to take the share of their respective parents equally."

The MASTER of the ROLLS held that the interest taken by each of the testator's nieces in the 2000*l.* legacy did not become absolute on their respectively attaining the age of twenty-one, but continued to be subject to an executory bequest over in the event of their leaving children living at their death; and an appeal was brought from that decision.

Sir *E. Sugden* and Mr. *Moore*, for the appeal, contended that, upon the true construction of this will, the testator must be considered as having given to his nieces, when they came of age, an absolute interest in their respective legacies. There was a gift of the *corpus* of the fund to the nieces; and, in case of their death, that is, their death under twenty-one,—for their death, at some period or other, was not a contingency, but a certainty, and for which therefore a testator would not naturally provide,—before their legacies vested, then over to their children, if they had any, the intention being that the children should stand in the place of their parents, and take the bequests which would otherwise have lapsed.

The authorities, all of which were consistent with this construction, might be ranged into two classes: they were either cases where the property was bequeathed to one person, and there was then a bequest in case of his death to another, which was held to be a substitutionary gift to the second in the event of the first dying in the testator's lifetime, or the bequest was to the legatee at a specified period, and then the death, in the event

event of which there was the gift over, was construed as a death before that period, when, by the terms of the bequest the interest was to become vested. The case at bar fell within the latter description, and was to be decided upon the same principle as *Slade v. Milner* (a), *Hinckley v. Simmons* (b), *Ommaney v. Bevan* (c), *Galland v. Leonard* (d), *Hervey v. M'Laughlin* (e) and *Doe v. Sparrow*. (g) If the testator had meant to restrict his nieces to a mere life interest in their legacies (and the construction contended for on the other side would really leave them no more), he knew perfectly well how to have done so, and would have expressed himself in the same unequivocal language as he used in the residuary clause.

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Mr. Kindersley and Mr. Soltau, *contra*.

The gift to the nieces in the residuary clause is simply for their lives, and is expressed in accurate and unambiguous language. But the terms, in which the 2000*l.* legacies are given, confer a very different and much larger estate: not indeed an absolute interest, but an interest which will become absolute and indefeasible in the event of their dying without leaving children, and disposable, therefore, in that event by the deed or will of the legatees. It is admitted that in form and substance this would be a good executory bequest; for whenever a testator bequeaths property to a person in words which import an absolute gift, and then goes on to provide that, upon the happening of a certain event, the property shall go over to another, if the event specified be within the legal limits as to time, the ulterior gift is supported as a valid executory bequest.

That

(a) 4 *Mad.* 144.

(b) 4 *Ves.* 160.

(c) 18 *Ves.* 291.

(d) 1 *Swan.* 161.

(e) 1 *Price*, 264.

(g) 13 *East*, 359.

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That is precisely the case here; the original gift purports to be to the nieces absolutely, when and if they attain twenty-one; and then follows a provision that in case of the death of either, leaving children, (a contingency which, as it must be determined within the period of lives in being, is not too remote), her legacy shall go to her children.

It is said, however, that the testator's intention was different; that he meant to bequeath the 2000*l.* to his nieces absolutely at twenty-one, and in case of their death under that age, then to their children, should they leave any. But to that the answer is, that he has not said so: the will, as it stands, is complete and intelligible, and the proposed insertion of the words, "in case of their death under twenty-one," would in truth impose a condition on the gift neither to be found in the instrument nor required by the sense. In all the instances in which the expression "in case of death" has been held to import substitution and not limitation, the death referred to is that of the legatee either in the lifetime of the testator or of a preceding tenant for life; but here the death alleged to be intended is that of the legatee after the testator, and before she had acquired any vested interest. None of the authorities cited touch the present question; for it is not disputed that, generally speaking, where a bequest is made to *A.* absolutely, and in case of his death to *B.*, or to *A.* for life, with remainder to *C.* and in case of *C.*'s death to *B.*, the event on which *B.*'s substitutional legacy is to accrue is the death of *A.* in the lifetime of the testator in the one case, and of *C.* in the death of the tenant for life in the other. Even upon this point, the decisions have been by no means uniform: *Nowlan v. Nelligan* (*a*) and

Douglas

(*a*) 1 Bro. C. C. 489.; and see *Bilings v. Sandom*, ib. 595.

Douglas v. Chalmer (a), where the words "in case of death," were held to refer to the death of the legatee at any time, shew that there is no positive rule, and that the whole instrument must be closely looked to in order to ascertain the probable intent. Now here in the residuary clause, where the testator did contemplate the contingency of death under twenty-one, he has taken special care to express it; and the argument therefore to be drawn from that clause, instead of being favourable to the appellant, makes strongly the other way. *Galland v. Leonard* (b) was a case under very peculiar circumstances, and was determined upon the intention, as it was to be collected from a careful consideration of all the provisions of the will.

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The LORD CHANCELLOR, after reading the two passages in the will already stated, continued as follows:—

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I do not think that the structure of the residuary clause throws any material light upon the other. It is true, that the testator there shews he can describe the contingency of a dying under age in apt terms, when he is minded so to do; and hence an inference is drawn in favour of the construction given by the Master of the Rolls to the first clause. But it is also true, that the other part of the residuary clause gives a most accurate description of a life interest, and a remainder limited upon the determination of such interest; from whence it may be argued, that had he intended to restrict his nieces to a life interest in their legacies, he would not have left his intention doubtful: and although the construction put on the first clause does not suppose the gift of a life interest, but an absolute gift defeasible on the death of the legatee leaving

(a) 2 Ves. jun. 501.

(b) 1 Swan. 161.

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leaving children living, yet it may fairly enough be said, that the reversionary interest of those children would have been otherwise provided for by the testator, who framed the residuary clause, had he meant them to take in succession after their parents. We may, therefore, dismiss the residuary clause, as not making more for the one side of the argument than for the other.

I have considered this bequest with great care, and as the conclusion to which I have come differs from that of his Honor the Master of the Rolls, I shall state the grounds upon which I have formed my opinion; premising that I should feel much more distrust of that opinion, were I not entirely convinced that it is in accordance with the whole current of decisions; that, with perhaps a single exception, it is not contradicted by any authority; and, that, upon a full and deliberate view of all the cases, I am driven either to reverse the judgment of the Court below, or to affirm it and thereby over-rule most of the cases in substance, and some of them in terms.

Questions of this kind rest more upon precedent than principle. The Courts have adopted certain rules of construction, and have given a certain sense to particular expressions. There can be no question that a bequest to any person, and in case of his death to another, is an absolute gift to the first legatee if he survives the testator: and this, whatever be the form of expression, as "if he die," "should he happen to die," "in case death should happen to him," and so forth. The event here contemplated being so inevitable that it cannot be deemed a contingency, the Courts have held that something else must be intended than merely to provide for the case of the legatee dying at some time or other: and have said, that they will rather suppose the
testator

testator to have contemplated and provided for the case of the legatee dying in his own lifetime; and so have read those words as if they had been, "in case of his death during the testator's lifetime," in which event alone they have allowed the bequest over to take effect. The inconsistency of treating as a contingency the event of all others the most certain is not the only consideration which has swayed the Courts in seeking for qualifications to restrict the generality of such clauses. The leaning in favour of vesting, and against a construction which would postpone the absolute enjoyment, and, indeed, keep in doubt and suspense the nature of the interest bestowed, has here, as in other branches of the law, operated powerfully in the same direction. To cite the instances in which the fundamental position to which I have referred has been laid down, or recognised and acted upon, would be to go through almost all the cases upon such bequests, from the case of *Lowfield v. Stoneham*, in *Strange (a)*, downwards. But there is a series of decisions by Sir *W. Grant*, in which he constantly adhered to the doctrine, commented upon the other cases, and reconciled some that were apparently, and but apparently, at variance with it, which may be consulted with great advantage as bringing the whole matter within a convenient compass. I allude to *Turner v. Moor (b)*, *Cambridge v. Rous (c)*, *Webster v. Hale (d)*, *Ommaney v. Bevan (e)*; and more particularly to the second of these, *Cambridge v. Rous*. That was a bequest to two sisters, and each gift was coupled with the proviso, that in case of the death of one, the legacy should devolve to the survivor. Both were held clearly to vest absolutely on the legatees respectively surviving the

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(a) 2 *Str.* 1261.

(b) 6 *Ves.* 557.

(c) 8 *Ves.* 12.

(d) 8 *Ves.* 410.

(e) 18 *Ves.* 291.

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the testator. But I cite this case as much for the powerful view which Sir *William Grant* takes, in his luminous judgment, of the other cases, as for the decision which he there pronounces. That no difference whatever is made by the circumstance of the legatees over being the children of the first taker is equally beyond dispute. Indeed, this was the case in *Turner v. Moor*, and in several other recent cases, particularly in *Slade v. Milner (a)*, decided by the present Master of the Rolls.

But although the Courts have resorted to the lifetime of the testator, in the absence of any other period, by reference to which the generality may be restricted, this construction has always been adopted with some reluctance, founded as it is upon a supposition which, if not violent, is yet somewhat strong, inasmuch as the maker of a will does not naturally provide for the event of his surviving his legatees, the selected objects of his posthumous arrangements. Such a construction has, accordingly, been termed "unnatural" by one Chancellor, and another, Lord *Hardwicke*, has traced the origin of the term "lapse," to the supposition that the possibility of the legatee dying in his lifetime escaped the observation of the testator. (b)

If there is a bequest to one for life, and after his decease to *A.*, and in case of *A.*'s death to his child or children, or to *B.*, the contingency is held referable to the lifetime of *A.*, the first legatee, and the bequest over only takes effect in case *A.* dies during the continuance of the life estate; he takes absolutely if he survives the tenant for life. This was precisely the case in *Hervey v. Maclaughlin* in the Exchequer (c), and in *Galland v.*

Leonard

(a) 4 *Mad.* 144.

(c) 1 *Price*, 264.

(b) *Ulrich v. Litchfield*, 2 *Atk.*

Leonard at the Rolls. (a) The latter was shortly this. A bequest to the widow for her life, and on her death the monies to be divided between the two daughters, and in case of the death of them or either of them leaving a child or children, to that child or those children. The daughters were held to take an absolute interest on surviving the widow, that is, the clause was read, "in case of their death during the lifetime of the first taker." It is hardly necessary to remark how close this case comes to the one at bar. Indeed the two cases cannot be distinguished as far as the clause goes, for in both the possibility contemplated is the same, namely, the death of the legatee, leaving a child or children, and that, though somewhat less vague than the clause "in case of death" generally, is yet held to describe an event too well defined, and therefore receives the restriction of the first taker's life, in order to advance the period of vesting, and to terminate the interval of suspense during which it must remain uncertain what amount of interest the legatee takes.

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It may thus be stated as a general proposition, that where the bequest over is in case of the legatee's death, and no other reference can be made, the period taken is the life of the testator; but where another can be found, that will be preferred, to avoid the supposition of the testator's having contemplated and provided against a lapse. A preceding gift for life, or other interest less than the absolute property, will furnish this reference. But this is not the only means of restricting the generality; and a direction that the gift shall vest at a given time, affords just as easy and as natural a reference as a preceding life interest. Thus a bequest to *A.*, and in case of his death to *B.*, is a gift absolute to *A.*, unless he dies

(a) 1 *Swan*, 161.

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dies in the testator's lifetime. A bequest to *C.* for life, and then to *A.*, and in case of his death to *B.*, is a gift absolute to *A.*, unless he dies during *C.*'s life. A bequest to *A.*, when and if he attain the age of twenty-one, and, in case of his death, to *B.*, is a gift absolute to *A.* unless he dies under age. It appears impossible to doubt that such would be the natural and obvious reading of the words in all these cases, if there were no general principles governing the legal presumption connected with the subject, and no authority of decided cases imposing a sense upon the expressions.

The decisions to which I have referred are upon the subject immediately before us. But a similar view of the matter pervades many of the cases upon an analogous point, namely, the time to which words of survivorship among tenants in common of a legacy shall be taken to relate, whether to the testator's decease or to the distribution of the fund, or to some other time; and although upon this subject the series of cases is much less unbroken, and there are some not to be reconciled with others, yet it may be observed that the leaning towards adopting a definite period, in order to advance the time when the interest shall become determinate, has led the Courts to take the testator's death, where no other limit could be found except the period of distribution, as in *Bindon v. Suffolk* (a), *Maberly v. Strode* (b), *Perry v. Woods* (c), and that class of cases; while the particular circumstances in some of the other cases, and, probably, still more, a disposition to avoid the supposition that the testator was providing for the case of his legatee's predecease, may have given rise to the decisions which followed; I allude to *Brograve v. Winder* (d)

Daniell

(a) 1 *P. Wms.* 96.

(b) 3 *Ves.* 450.

(c) 3 *Ves.* 204.

(d) 2 *Ves. jun.* 634.

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construction of any subsequent clause which will make it consistent with the intention plainly expressed in the preceding part. If we read the latter part as contemplating a dying at any time, and as converting the legatee's interest, from an absolute interest in the capital sum, into a life annuity in the event of her leaving a child at her death, we entirely destroy the first part of the clause, which provides for the interest vesting at twenty-one. According to this construction, she has attained her age of twenty-one in vain ; for at that period, so anxiously pointed out by the will as the time when she was to receive the sum of 2000*l.* sterling, she only acquires the chance of her will operating upon it in case she dies childless. During all the days of her life she has no more control over it after twenty-one than she had before. It appears quite clear to me that the other construction is the sound one. Having first provided for the legacy vesting when the legatee is of age, and secured it against the interference of others in the event of marriage, the testator provides for the case of the legatee dying under age, and leaving a child or children; in that case they take their mother's legacy, because she did not live till it vested in her. This seems the better restriction to introduce, and more in accordance both with the probable intention and with the authorities, than if we read the words " in case of decease," as referring to the death of the legatees in the lifetime of the testator. But that the construction adopted below, of death at any time, is inconsistent with all the cases from the earliest downwards, I feel fully assured, and shall now proceed to shew.

In doing so I have no occasion to refer to more cases than I have already cited in support of the construction which I put upon the clause. I may add, however, to the judgments of Sir *W. Grant*, already referred to, the
case

case of *King v. Taylor* (a), decided by Lord *Alvanley*, where the bequest was to a son when he should attain the age of twenty-three, and to a daughter, with a provision securing her interest during coverture, and if either child should die, then the survivor to have the share of the other; and Lord *Alvanley*, in declaring both legacies to vest absolutely, the one at twenty-three, the other at the testator's death, dwells much on the time of vesting being specified as to the son's portion, and shews how this case differs from others which have been sometimes supposed to throw doubt upon the doctrine. The same difference, it may be observed, exists in a stronger degree in the present case.

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But it may be fit that we should advert to those cases which have sometimes been supposed to proceed upon a different view. A little attention will shew that these, in reality, stand in no kind of conflict with the others, with the exception, perhaps, of the solitary decision of *Lord Douglas v. Chalmer*. They are not numerous, and they all turned upon very special circumstances. Thus *Billings v. Sandom* (b) was a bequest to *A.* of 1000*l.*, and in case of the legatee's death 800*l.* to *B.*, and 200*l.* to *C.* The manner of dividing the sum between two, in unequal portions, might perhaps be thought to indicate a peculiar contemplation of the legatees over. But the decision did not go upon that. Lord *Thurlow* particularly relied upon the residuary clause, which expressly gave to the same *A.* the residue "to be disposed of as he should think proper;" and his judgment plainly rested upon the contrast between the testator's expression, when he clearly intended to give her the absolute interest, and his expression in giving the legacy when he did not bring out his meaning

(a) 5 *Ves.* 806.

(b) 1 *Bro. C. C.* 595.

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ing distinctly. That this was the ground is sufficiently clear from the report; and it is put upon this, and with approbation, by Sir *W. Grant* in *Cambridge v. Rous* (a), where he comments upon Lord *Thurlow's* decision.

So, too, in *Nowlan v. Nelligan* (b), Lord *Thurlow* held it to be clear, from the very peculiar manner in which the daughter was mentioned, and also the widow (the legatee), in relation to the daughter, that the latter was, at all events, to take something; and the only way in which this could be accomplished was by giving effect to the executory bequest, and holding the death of the first taker to mean her death at any time. This view of Lord *Thurlow's* reasoning is approved by Sir *W. Grant* in the case, so often referred to, of *Cambridge v. Rous*.

There remains to be considered the case of *Lord Douglas v. Chalmer* (c), upon which it may first of all be observed, that it differs from the present case in this material particular. It was a bequest over, in case of death only, without any limitation to be derived from a preceding life estate or period of vesting specified; so that the Court had only to choose between giving effect to the executory bequest, and supposing the testator to have had in view a lapse by predecease of the first taker. That decision, therefore, might well stand with the one I am now making, inasmuch as the Court is not here driven to elect between giving effect to the executory bequest, and holding the first gift to vest at the testator's death, but has the other course, always to be preferred where the will leaves it open, namely, that of taking a period to which the death may relate other than

(a) 8 *Ves.* 12.

(b) 1 *Bro. C. C.* 489.

(c) 2 *Ves.* jun. 501.

than the testator's lifetime. But though this consideration removes *Douglas v. Chalmer* out of the way as regards the present purpose, still it may be said to leave it in conflict with the whole of the decisions where the testator's life was the period fixed upon. It is to be considered, therefore, whether there be not peculiarities in that case by which it may be reconciled with the others, or something in the decision itself which may diminish its value as an authority.

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The question arose upon the gift of the residue to Lady *Douglas*, and in case of her decease to her children. Lord *Loughborough* relied mainly upon the codicil; he considered the manner in which a jewel was there given to Lady *Douglas* as indicating that the testatrix could not have intended to give her the absolute interest in the residue, for that would have made this part of the codicil superfluous. He also relied upon the manner in which the codicil provides for a case of predeceasing the testatrix, which is done in very express words, "if *A. B.* should be dead before me," as shewing that such predecease could not have been in her contemplation, when she framed the legacy to Lady *Douglas*; and when his Lordship came to give his second judgment upon the rehearing, he dwelt upon another circumstance which might very fairly be taken into the account; namely, that giving an absolute interest to Lady *Douglas* was giving it to her husband, there being no sole and separate use provided for, which it seemed unlikely the testatrix should intend, as the mention of children shewed a desire that they, and not their father, should take. It needs hardly be remarked that those peculiarities on which Lord *Loughborough* relied belong none of them to the present case; and only one of them (the last), to any of the other cases. That they are sufficient to reconcile the decisions with those other cases

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cases is perhaps more than can safely be affirmed; although Lord *Alvanley* and the other Judges, in commenting upon the case, seem to think that they go a great way towards effecting such a reconciliation. The language of Lord *Loughborough* certainly cannot be so reconciled, especially where he says "that taken by themselves the words admit of little doubt; such a gift implying naturally that the parent is to take for life, and the children the capital at the parent's death:" a proposition in the very teeth of all the authorities. The observation too upon *Nowlan v. Nelligan*, that it was a much stronger case, is not to be supported. These considerations certainly lessen the authority of that decision, in so far as it may be in conflict with the others; but a bias appears to have existed in the learned Judge's mind towards the construction which he adopted, arising from his extra-judicial knowledge of a fact not in the cause. Lord *Douglas* had been married before, and had children by his first wife; it was the children of the second wife whom the testatrix, their grandmother, plainly meant to favour, and yet the construction which would give Lady *Douglas* an absolute interest, by giving it to Lord *Douglas*, brought in the children of the first marriage equally with the objects of her bounty. Lord *Loughborough* very fairly admits that this consideration moved him; but it is clear he had no right to regard it. Then it must be remembered, that three years afterwards, the same learned Judge decided *Hinckley v. Simmons* (a) according to the current of authorities, and without any hesitation. That was a bequest of all the testatrix's fortune to *A.*, and in case of her death to *B.* Lord *Loughborough* said that however hard, it was a case of very little difficulty, and he cited *Lowfield v. Stoneham* (b), but made no reference to *Douglas v. Chalmer*; from which

(a) 4 Ves. 160.

(b) 2 Str. 1261.

which one of two consequences must be allowed to follow; either that he did not adhere to his former opinion; or, which is most probable, that he considered it to depend upon the peculiarities of the case, and not to touch the general rule.

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But a discrepancy much more difficult to be reconciled is to be observed between the decision now under appeal, and an earlier determination of the same learned Judge who pronounced that decision; I allude to the case of *Slade v. Milner*.^(a) That was a series of bequests to different persons, chiefly females, and in each there was a proviso that in case of her death, the said sum should be divided equally among her children. The residuary clause gave the residue to three persons, among whom was one of the former legatees, and added, that in case they should have departed this life before the testatrix, and consequently before the will took place, then the residue was to go among the children of two of the residuary legatees, and the children of a third person deceased. His Honor held the case so clear against the executory bequest on the death of the legatees, that he called on the other party to support it: and decided that the natural sense of the words plainly gave an absolute interest, and that there was nothing in any other part of the will to disturb this inference. Yet the residuary clause was clearly so framed as to shew that when the testatrix contemplated the predecease of legatees, she could use very precise terms: indeed this residuary clause affords to the full as strong an argument in favour of the executory bequest, as that on which Lord *Loughborough* relied so much in *Douglas v. Chalmer*; and it is remarkable that the case with which this last comes most into collision is *Slade v. Milner*, decided without any doubt by the same

(a) 4 *Mad.* 144.

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same learned Judge, whose present decree can only be supported upon the authority of that very case, or rather of the language of that very case, of *Douglas v. Chalmer*.

I am, on the whole, clearly of opinion that the decree cannot stand; that it gives a construction to the will neither consistent with the natural import of the words, nor borne out by any authority, while it is contradicted by all the decisions upon the point, and almost all the authority upon questions of a similar kind.

The judgment must, therefore, be reversed, and the nieces of the testator declared to take an absolute interest in their legacies of 2000*l.*, upon attaining the age of twenty-one respectively.

Nov. 25.

M'MASTER v. LOMAX.

Whether the
2 W. 4. c. 33.
extends to
Scotland,
quære. If it
does, the act
is discre-
tionary only,
and the Court
in this case
refused so to
extend it.

MR. COOPER moved for an order that an attachment might issue under the writ of the sheriff of *Wigtonshire*, or other proper officer in *Scotland*, against the Defendants *Stewart* and his wife, who were in contempt for want of an answer.

The bill sought to carry into effect the trusts of a will relative to certain real estates situate in *Southwark*, of the rents and profits of which *Stewart* and his wife were alleged to be in the receipt, their place of residence being in the county of *Wigton*. Under an order made by the Vice-Chancellor, on a special motion that service of the subpoena together with a copy of the prayer of the bill upon the Defendants in *Scotland* should be deemed good service, Mr. and Mrs. *Stewart* were served, and an appearance was entered for them. They after-
wards

wards took out two orders for time, which had now expired.

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Mr. *Cooper* submitted that this case fell within the letter as well as the spirit of the recent statute 2 *W. 4. c. 33.* That statute was expressed in general language, applying in terms to the "United Kingdom of *Great Britain*," and making no exception with respect to *Scotland*. It appeared, moreover, to have been passed for the very purpose of reaching parties, in whatever part of the realm they might have their residence, who were in the enjoyment of real estates lying within one jurisdiction while their place of domicile rendered them amenable only to another and a different one;—a circumstance which, by enabling dishonest persons to defeat just claims upon property so situated, had heretofore occasioned a defect of justice, often regretted by courts of equity, and now, for the first time, attempted to be remedied. The Vice-Chancellor, before whom this application was originally made, had desired the matter to be brought before the head of the Court, as it involved the framing of a new form of order; but then, as well as previously when he granted the subpœna, his Honor was clearly of opinion that the act must be construed as extending to *Scotland*.

The LORD CHANCELLOR said that, although the words of the enactment were certainly large and comprehensive, he entertained no doubt whatever that the statute in question had never been intended or supposed to apply to *North Britain*. The measure had been submitted to parliament on the suggestion of Lord *Plunkett*, whose object was (as might be collected from a comparison of the first and second sections) to make the process of the respective courts of equity in *England* and *Ireland* run interchangeably in all cases where the

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lands, the subject of the suit, were situated in the one country, and the defendants sought to be affected by it resided in the other. If the statute were to be construed in the manner contended for, it would amount to a virtual repeal of one of the provisions in the articles of union, although *Scotland* was never once mentioned by name in any part of the act. Under the circumstances, he should be most reluctant to accede to that construction. At any rate, as the language of the act was not imperative, but merely vested a discretionary power in the Court, "if they shall so think fit," he should decline to make any order on the present application.

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The ATTORNEY-GENERAL v. The Bailiffs and
Burgesses of EAST RETFORD.

ROLLS.
June 10.

THIS was an information filed, under the direction of the commissioners of charities, for the purpose of inquiring into certain breaches of trust alleged to have been committed by the corporation of *East Retford*, in their capacity of trustees of the free grammar school of that town.

At the hearing of the cause the Master was directed to inquire and state what lands the corporation became seised of in trust for the charity in question; what lands had been alienated by them, and for what consideration, and under what circumstances, and how the produce had been applied.

From the Master's report it appeared that the charity property consisted principally of lands which had formerly belonged to the dissolved chantries of *Sutton*, *Turford*, and *Annesley*, and which in the year 1550 had been granted by letters patent of King *Edward VI.* to the bailiffs and burgesses of *East Retford* for the endowment

Where a corporation follow the practice of their predecessors in the application of the profits of charity estates, and no wilful breach of trust or improper motive is imputed to them, the account will not be carried back beyond the time when they had notice that the propriety of such application was questioned. But where the charity estates have been alienated, though at a very distant period, the corporation will be made to com-

of
pensate the present value of the lands so alienated, out of such general property of the corporation as was not granted or devised to them upon special trust.

It is the duty of a corporation, when apprised by the information of the nature and extent of the claims made upon them, to cause a diligent examination to be made, before they put in their answer, of all deeds, papers, and muniments in their possession or power, and to give in their answer all the information derived from such examination; and if they pursue an opposite course, and in their answer allege their ignorance upon the subject, and the information required is afterwards obtained from the documents scheduled to their answer, the Court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice, and on that ground alone will charge them with the costs of the suit.

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of a grammar school in that town; and partly also of other lands which became vested in the same trustees upon the like trusts by the benefactions of Sir *John Hercie* in 1553, of two persons of the names of *Rozell* and *Homes* in 1562, and of the Rev. *William Houghton* in 1673.

It further appeared that the corporation at different times had alienated parts of the charity estates; and in particular that in the years 1583, 1805, 1806, and 1816 sales had been effected of portions of the property, and the produce applied towards the redemption of the land tax on the corporation estates, or for the general purposes of the corporation. It was also established by an entry in the corporation minute book, that in the year 1656 the bailiffs and burgesses had authorized a sale of all the lands situate at *Kirton*, and theretofore belonging to the chantry of *Tuxford*, whereof they were seised as trustees for the use of the free grammar school, for the purpose of raising a sum of money to be applied in rebuilding the church and steeple of *East Retford*, and that the sale had taken place, and the money, amounting to 300*l.*, had been applied accordingly.

The cause having now come on for further directions, the main question discussed related to the manner in which the corporation should be charged in taking the accounts, and to the costs of the suit. A petition presented by the master of the school was set down to be heard at the same time.

Mr. *Pemberton* and Mr. *William Russell*, for the informant.

Mr. *Skirrow*, for the schoolmaster and usher.

Mr.

Mr. *Temple*, for the second master.

Mr. *Bickersteth* and Mr. *Barber*, for the corporation.

As the leading topics adverted to in the course of the argument are noticed in his Honor's judgment, it becomes unnecessary to state them separately.

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The MASTER of the ROLLS.

Where the corporators, for the time being, have no knowledge of the fact, that the lands in question were devised for charitable purposes, nor any knowledge of circumstances which ought to have put them upon inquiry into the nature of their title to the lands in question, but have *bonâ fide* followed the practice of their predecessors in the application of the rents and profits, either to other charitable purposes not warranted by the will of the deviser, or to the general purposes of the corporation; it appears to me that in such case, there being no wilful breach of trust or improper motive imputable to the ancient corporators, it would be unfit to compel the corporation to account for, and satisfy out of their general corporate property, the rents and profits so applied by them before they had notice that the propriety of such application was questioned. In the present case, the corporation had not this notice, until it was given to them by the report of the charity commissioners. To carry back the account from the commencement of the misapplication in such cases would prove the ruin of half the corporations in the kingdom, and is not necessary for the purpose of giving effect, in future, to the intention of the donor.

It is argued that inasmuch as an item regularly appeared in their annual accounts, of payments made to a schoolmaster and usher, and they were therefore fully


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aware of the existence of a school, this was a circumstance which ought to have put them upon inquiry into the origin of this payment. If an individual makes an annual payment for a particular purpose out of the profits of his estate, it is reasonably to be presumed, from the strong interest which he has to resist an unfounded demand, that he has inquired into the origin of the claim, and he is therefore fixed with implied notice of all the circumstances which attend it. But the same presumption does not apply to corporators, because, having no immediate personal interest in the application of the profits of the corporate property, they may, without the imputation of culpable negligence, adopt and follow the practice of their predecessors in this respect. I cannot, therefore, hold that the fact of the existence of the school, and the payment to the schoolmasters, does fix the corporation with implied notice of the several grants and devises made in favour of the school.

In the year 1656, this corporation alienated some part of the property devised to them for charitable purposes, for money which they applied to their own use; and it cannot be denied that this transaction, at the time, was a wilful breach of trust. In the years 1805 and 1806, they alienated other small parts of the property devised to them for charitable purposes, in ignorance of the fact that it was so devised to them.

For all these alienations they must make compensation out of the general corporate property; for this is necessary in order to give effect in future to the intention of the donor: and there must be a reference to the Master to inquire what is the present value of the charity funds so alienated in 1656; and if the Master shall find that any substantial improvements have since
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the alienation been made upon those lands, let him state the nature of those improvements, and any special circumstances relating to them. With respect to the alienations made in the years 1805 and 1806, the Attorney-General being willing to accept the sums produced upon such alienations, with interest at 5 per cent. from the time when the sums were respectively received, let the corporation account for the same accordingly.

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In stating that the corporators are to be answerable out of their general property, I mean out of such property as was not granted to them upon any special trust. The charities cannot be permitted to receive compensation for the breaches of trust committed with respect to their estates out of property devoted by the donors to other special purposes. It must, therefore, be referred to the Master, to inquire what real and personal property the corporation were possessed of or entitled to, at the time of filing the information, and are now possessed of or entitled to, which was not granted or devised to the corporation upon any special trust; with liberty to state any special circumstances respecting such property, at the request of either party. And if the Master shall find that the corporation have alienated any real or personal property between the time of filing the information and the time of his inquiry, let him state all the circumstances respecting such alienation. This inquiry I direct in consequence of the suggestion at the bar, that there is reason to suspect that an attempt has been made to defeat the object of this information.

With regard to the costs of the suit, it is to be observed, that the corporation in their answer state their utter ignorance of the charity property, and of the trusts which attended upon it, and leave the Attorney-

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General to make out the allegations of the information as he may be able. They are required to set forth a schedule of all their deeds, papers, and muniments, and such schedule they have accordingly set forth; and it is from the deeds, papers, and muniments, set forth in the schedule, that all the knowledge possessed by the informant with respect to this charity property has been obtained. As the corporation were fully apprised, by the information, of the nature and extent of the claims made upon them, it was their bounden duty, before they put in their answer, to have caused every deed, paper, and muniment in their possession or power to be diligently examined, and to have given in their answer all the information which resulted from such examination. The very opposite course pursued by them in that respect manifests a disposition to obstruct and resist the course of justice, which alone, without reference to other parts of their conduct in the cause which are suggested to have been vexatious, would make it the duty of the Court to charge them with all the costs of the suit; and not only the costs of the Attorney-General, but the costs also of the schoolmaster and the usher, who are made parties Defendants. The claim of these last-named Defendants upon the income of the charity cannot well be considered until the extent of the charity property has been ascertained by the Master's report: let the petition of the schoolmaster in that respect stand over, and reserve the consideration of all further directions until that report has been made.

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WAUGH v. WAUGH.

ROLLS.
June 28.

A PART of the will of *John Neill* was in the following words :—“ I further give and bequeath unto my said executors 5000*l.* 3 per cent. consolidated bank annuities as a general, and not as a specific legacy, upon the trusts following; that is to say, upon trust to pay to my nephew *John Waugh*, or to his assigns, the dividends arising therefrom during his life, and, after his decease, to hold the principal in trust for all his children who shall survive him, and the issue then living of any of his children who shall have departed this life before him, leaving issue, equally to be divided among them, share and share alike; but so that the issue of any deceased child shall take only the share which such child would have taken if living, to be divided equally among such issue; and in case there shall be no child of the said *John Waugh*, nor any issue of a deceased child, living at the time of the decease of the said *John Waugh*, then I direct my said executors to hold the said principal stock in trust for all the brothers and sisters of my said nephew *John Waugh* who shall be living at the time of his death, and the children then living of any of his brothers and sisters who shall have previously departed this life, equally to be divided amongst such brothers and sisters and children; but so nevertheless that the children of such deceased brother and sister shall take only the share which their parent would have taken, if living, which shall be equally divided among such children.”

A testator gave a sum of 5000*l.* in the event of the death of his nephew *J. W.* without leaving issue, to be equally divided among all the brothers and sisters of *J. W.* who should be living at the time of his death, and the children then living of any of his brothers and sisters who should have previously departed this life, but so that the children of such deceased brother and sister should take only the share which their parent would have taken if living: Held, that a child of a brother of *J. W.*, which brother was dead at the making of the will, took no share of the 5000*l.*

In a subsequent part of his will the testator gave a legacy of 3000*l.* stock to the Plaintiff *Eleanor Waugh* and

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and her children, describing *Eleanor Waugh* as the daughter of his late nephew *Alexander Waugh*, who was a brother of the testator's nephew *John Waugh*.

The testator's nephew *John Waugh* died without leaving any child or any issue of a deceased child; and a question in the cause was, whether the above-mentioned *Eleanor Waugh*, who was living at the death of *John Waugh*, was entitled to share in the 5000*l.* stock as a child of a brother of *John Waugh*, who had previously departed this life.

Mr. Pemberton for the Plaintiff.

There is here a substantive gift, in the event which has happened, to two classes of persons; namely, brothers and sisters of *John Waugh* living at his death, and children living at the death of *John Waugh* of any of his brothers and sisters who should have previously departed this life. The Plaintiff indisputably comes within the latter class; and, if she is not entitled to any benefit under this bequest, she can only be excluded by the effect of the subsequent words, which limit the shares of children of deceased brothers and sisters to such as their parents would have taken if living. There is nothing in those words which necessarily cuts down the generality of the previous description of the class intended to take, so as to exclude the daughter of a brother of *John Waugh*, who died before the date of the will. The plain object of the clause annexed to the gift is, not to limit the number of takers falling within the class previously described, but to fix the amount of their shares, by providing that the children of deceased brothers and sisters shall take by representation, and be entitled to no more than their parents, if living, would have taken. The testator's general intention was, that the children

of

of such brothers and sisters of *John Waugh* as had died previously to *John Waugh's* decease, should stand in the place of their parents; and it is perfectly immaterial, for the purpose of construing this bequest, whether such parents died before or after the date of the will. In *Christopherson v. Naylor (a)*, the bequest was to each and every the child and children of the testator's brothers and sisters (who were named) which should be living at the time of his decease, except his nephew *J. F.*; but if any child or children of his said brothers and sisters (except *J. F.*) should happen to die in his lifetime and leave issue, then such issue were to take the share or shares of the parents. Three children of a sister of the testator died before the date of the will, leaving issue; and such issue were held not to be entitled under the bequest, because nothing was given to the issue of the testator's nephews and nieces, except by way of substitution; and the issue of such nephews and nieces as were dead before the date of the will could shew no objects of substitution—no original legatees in whose places they were to stand. That case is distinguishable from the present, because there the parents, in whose place the issue were to stand, were expressly described as brothers and sisters of the testator living at his death; and it is observable that, if the question had depended upon the words “*shall happen to die in my lifetime,*” Sir *William Grant* seems to have inclined to acquiesce in the argument, that those words might have admitted of the construction “*shall have happened to die,*” or “*shall happen to be dead in my lifetime,*” so as to support a gift to issue of a niece who was dead at the date of the will. *Christopherson v. Naylor*, therefore, so far as it is applicable to the present case, is, in reality, a strong authority in favour of the Plaintiff; for here the words “*shall have happened*”

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(a) 1 *Mer.* 520.

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happened to depart this life" naturally include a period antecedent to the date of the will, so that there is no necessity for resorting to the forced grammatical construction, in which, however, Sir *William Grant* was prepared to acquiesce; and the language of this will does not necessarily confine the gift to such issue only as represented parents capable of taking in the character of original legatees; a circumstance which compelled the Court in *Christopherson v. Naylor* to hold the gift to the issue to be substitutionary.

Mr. Bickersteth and Mr. Rogers, contra.

The gift to the children is plainly substitutionary in the event of the failure of the previous gift to such brothers and sisters as might have acquired a vested interest in the legacy if they had survived *John Waugh*; but *Alexander Waugh* could never have acquired such vested interest, for he was dead at the date of the will, and no substitution therefore could have been contemplated with respect to his issue. In *Butter v. Ommaney* (a), the gift was after the death of two persons to such children of *B.* as should be then living; and as to such of them as should be then dead leaving children, the testator directed that the children should stand in the place of their parents. The words "such of them as *should be then* dead" were stronger in favour of the claim of the children than in the present case, yet it was there held that the children of such children of *B.* as died in the testator's lifetime and were also all dead at the date of the will, took nothing under this bequest. There is the less ground in the present case for supposing that the testator intended to include *Eleanor Waugh* among the children of deceased brothers and sisters of *John Waugh*,

(a) 4 *Russ.* 73.

Waugh, because he gives her a large specific legacy, describing her as the daughter of his late nephew *Alexander*.

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Mr. *Pemberton*, in reply.

The MASTER of the ROLLS.

It is plain that the words used in the first part of the bequest would comprise *Eleanor Waugh*, for she was the child of *Alexander Waugh*, a brother of *John*, who had died before *John*; but by the subsequent part of the gift it is expressed, that the children of a deceased brother of *John* are to take only the share which their parent would have taken if living; by which is to be understood, would have taken *under that bequest* if living; and the parent of *Eleanor*, being dead at the time of making the will, could have taken nothing under that bequest, and therefore *Eleanor* will not share in the 5000*l.* This construction would be fortified, if it required such aid, by the special provision which the testator subsequently makes in his will for *Eleanor* as a child of a deceased brother of *John*.

1838.

ROLLS.
July 1. 8.

STORRS v. BENBOW.

A legacy of 500*l.* a piece "to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship," does not include a child born after the testator's death.

A CODICIL to the will of *William Townsend* contained a bequest in the following words: — "Item, I direct my executors to pay, by and out of my personal estate exclusively, the sum of 500*l.* a-piece to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship."

The question was, whether the Plaintiff, *William Townsend Storrs*, who was a grand-child of one of the testator's brothers, and who was born after the testator's death, was entitled to a legacy of 500*l.*, under this bequest.

Mr. *Bickersteth* and Mr. *Parker*, for the Plaintiff.

Mr. *Pemberton* and Mr. *Ching*, *contrà*.

The testator, having by his will given legacies of 500*l.* each to all the children of his nephews and nieces living at the date of his will, makes a similar provision in this codicil for such children of his nephews and nieces as might be born afterwards; and the question is, how far the words of futurity "may be born," can be extended—whether they can be applied to all the children of the testator's nephews and nieces, who might be born at any time after the testator's decease; or whether the gift is to be confined to such children only as might be born between the date of the will and the death of the testator. The time at which the will speaks, namely, the testator's death, is the limit which ascertains the number of children

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children entitled to legacies under this bequest. A different construction would have the effect of leaving it uncertain how many legacies of 500*l.* were to be distributed until the death of all the testator's nephews and nieces, and consequently of postponing the distribution of the residue of the testator's personal estate until that period. *Sprackling v. Ranier* (a) is a case very nearly resembling the present. There the testator gave, in a certain event, a legacy to the sons and daughters of his daughter, lawfully begotten, or *to be begotten*, and it was held that the words *to be begotten*, could not be construed so as to include a child born after the death of the testator. So in *Ringrose v. Bramham* (b), where the testator gave to A's children 50*l.* to every child *he hath* by his wife, to be paid them as they shall come of age; and A. had eleven children at the date of the will, thirteen at the testator's death, and three born afterwards; the thirteen children living at the death of the testator were held to be entitled, but not the three born afterwards. *Hill v. Chapman* (c) and *Davidson v. Dallas* (d) are also authorities for the exclusion of the after-born children.

Mr. *Bickersteth* in reply.

Sprackling v. Ranier is a case of questionable authority, for the decision in that case would have excluded a child with which the testator's daughter might have been *enceinte* at his death, such child being lawfully begotten, and consequently clearly within the express terms of the gift. As to *Ringrose v. Bramham*, the ground upon which the two children, born between the date of the will and the testator's death, were let in, was, that as the will spoke at the testator's death, the word

"*hath,*"

(a) 1 *Dick.* 344.

(b) 2 *Cox,* 384.

(c) 1 *Ves.* jun. 405.

(d) 14 *Ves.* 576.

1833.
STORRS
v.
BENBOW.

"*hath*," though of the present tense, might well be applied to such children. If the same principle be applied here, and the same *punctum temporis* be taken for interpreting the expressions used by the testator, the words "to be born," which are emphatically words of futurity, must be extended to the after-born children.

July 8.

The MASTER of the ROLLS.

This is an immediate gift at the death of the testator, and is confined to the children then living. The words "may be born," provided for the birth of children between the making of the will and the death. The cases of *Sprackling v. Ranier*, and *Ringrose v. Bramham* are direct authorities to this point. To give a different meaning to the words "may be born," would impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until after the deaths of all the children of either of his brothers.

1833.

WARREN v. DAVIES.

Rolls.
July 1. 8.

RICHARD DAVIES began his will in the following words: — “First, I will and direct that all my just debts, legacies, funeral expences, and testamentary charges, shall be paid by my executors hereinafter named.” He then gave his real estates in the parishes of *Whittington* and *St. Martin’s*, and also all his money, farming stock, household furniture, and effects, to his wife for life, and after her decease he directed the whole of his property on *Ifton Rhynn* to be sold as his executors thereafter named should direct, and he devised certain of his messuages and lands in *Whittington* aforesaid, to his son *Thomas Davies* in fee. After making divers pecuniary bequests to his other children, the testator gave the residue of his estate and effects, both real and personal, to his said son *Thomas Davies*.

A testator in the first place directs the payment of his debts and legacies by his executors after named. He afterwards devises a real estate to his son *T. D.* in fee; and in a subsequent part of his will names *T. D.* and another person his executors, who both prove the will. The estate devised to *T. D.*, not being a devise to the executors after named, is not charged with debts and legacies.

The executors named in the will were the testator’s son *Thomas Davies*, and *Roger Ward Davies*, both of whom proved the will.

John Davies was the eldest son and heir-at-law of the testator. Both the executors attested the execution of the will, and the devise of the real estate to *Thomas Davies* being therefore void under the 25 G. 2. c. 6., and the estate having descended on *John Davies* the heir-at-law, the question in the cause was, whether the estate, which the will purported to devise to *Thomas Davies*, was or was not charged with the payment of debts and legacies, by the effect of the first words of the will.

1833.

WARREN
v.
DAVIES.

Mr. *Bickersteth* and Mr. *G. Richards*, for the legatees, contended that the introductory passage in the will, by which the testator first directed all his just debts and legacies, &c. to be paid by his executors thereafter named, coupled with the appointment of *Thomas Davies* as an executor, in effect amounted to a charge of those debts and legacies upon all the property which was devised to *Thomas Davies* by any subsequent part of the will; *Clifford v. Lewis* (a), *Henvell v. Whitaker* (b). Such devise, it was true, as far as it applied to the interest of *Thomas Davies*, was rendered invalid by the operation of the 25 G. 2. c. 6.; but still the testator's heir-at-law, on whom, in consequence of the failure of the devise, the estate descended, was in equity bound to hold it, subject to all the charges which the testator had intended to impose on it in the hands of his devisee, including of course the payment of the legacies, if the personal estate proved insufficient for that purpose.

Mr. *Pemberton* and Mr. *Pegge*, *contra*, for the heir-at-law, submitted, that even if the devise had been effectual, a charge which was imposed upon the property given to the individuals who should fill the joint office of executors, could not extend to a devise made to *Thomas Davies* alone in his private capacity, so that *Henvell v. Whitaker* had no application. Whether that were so or not, however, the title of the heir-at-law in this case was not under, but paramount to the will, and it could not therefore be affected by any charge which that instrument attempted to create; *Powell v. Robins* (c), *Parker v. Fearnley* (d), *Willan v. Lancaster*. (e)

Mr. *J. J. Jervis*, for the executors.

Mr.

(a) 6 *Madd.* 33.

(b) 3 *Russ.* 343.

(c) 7 *Ves.* 209.

(d) 2 *Sim. & St.* 592.

(e) 3 *Russ.* 108.

CASES IN CHANCERY.

51

Mr. *Bickersteth* in reply.

The MASTER of the ROLLS.

Where a testator directs his debts and legacies to be paid by his executors after named, all property given to the persons, who are named executors jointly, will be charged with the payment of debts and legacies.

The devised estate in question is not given to the executors jointly; it is specially devised to *Thomas Davies*, who happens to be one of the executors, but it is not for that reason to be considered as given to the executors, and charged with the payment of debts and legacies within the intention of the testator.

1833.

WARREN
v.
DAVIES.
July 8.

1833.

ROLLS.
June 21.

STEED v. CALLEY.

Where a sum of stock was bequeathed to a married woman, whose husband was of unsound mind, though no commission of lunacy had issued against him, the Court, on a bill filed by the husband and wife for payment of the legacy, transferred the fund into Court to the joint account of the Plaintiffs, and afterwards, in consideration of the poverty of the parties, made an order, on the petition of the wife, that the dividends should be paid to her for her life.

THE bill was filed by Mr. and Mrs. *Steed*, against *Charles Calley*, the executor of *Richard Smith*, for payment of a legacy of 20*l.* in the long annuities, bequeathed by the will of *Smith* to Mrs. *Steed* absolutely.

The answer of the Defendant stated, that Mr. *Steed*, the husband, was of unsound mind; but no other objection was made to payment of the legacy.

No commission of lunacy had issued against Mr. *Steed*.

At the hearing of the cause on the 14th of *June* 1833, the Master of the Rolls, in consideration of the poverty of the parties, directed the 20*l.* long annuities to be transferred to the Accountant-General, to be carried to an account, entitled "the husband's and wife's account;" and his Honor at the same time suggested, that a petition might then be presented by Mrs. *Steed*, supported by an affidavit of the husband's insanity, and praying that the dividends might be paid to her during her life.

A petition to that effect was accordingly presented, and now came on to be heard.

From the statement in the petition, which was verified by affidavits, it appeared that the husband was of unsound mind, and incapable of managing his affairs, and that he was in confinement in a lunatic asylum; that he had a large family of young children, who resided with their

their mother at a distance of upwards of fifty miles from *London*, and that the family were in narrow and distressed circumstances. The petition suggested, that as *Mrs. Steed* lived at a distance from town, and as, by reason of her being a married woman, she was incapable of executing a valid power of attorney, the Court might authorize her solicitor and next friend to receive the dividends on her behalf, on his producing a receipt for them signed by herself.

1833.
—
STEED
v.
CALLEY.

Mr. Hetherington for the petition.

The MASTER of the ROLLS, by his order, directed that the dividends to become due upon the 20*l.* long annuities, should be paid to the petitioner *Elizabeth Steed*, on her sole receipt, or to *Mr. Hudson*, her solicitor and next friend, *Mr. Hudson* undertaking to pay the same to the petitioner.

Reg. Lib. B. 1832, fol. 1972.

1833.

ROLLS.
July 3.

The Bishop of EXETER v. Lord and Lady WARD.

The trustees under a will, in which a life annuity of 6000*l.* a year, and other considerable benefits were given to a person, who, at the death of the testator, was confined in a lunatic asylum, filed a bill for the directions of the Court, in executing the trusts of the will relative to the lunatic. The wife of the lunatic presented a petition, praying an allowance out of the income given to the lunatic, and the Court thereupon referred it to the Master to inquire into his state of mind, and the Master having reported that he was of unsound mind, and not com-

UNDER the will of the Earl of *Dudley* the defendant Lord *Ward* was entitled to an annuity of 6000*l.* a year for life, and also, during his life, to the testator's mansion-house at *Himley* in *Staffordshire*, and to the right of presentation to all livings, the advowson whereof or presentation to which belonged to the testator.

The bill was filed by the trustees of the Earl of *Dudley's* will. It stated that applications had been made to them by the defendant Lady *Ward*, the wife of Lord *Ward*, representing that Lord *Ward* was of unsound mind, and had been confined in a lunatic asylum for two years prior to the death of the Earl of *Dudley*, and that he still continued of such unsound mind, and requesting that an allowance might be made to her out of the 6000*l.* a year given to Lord *Ward* by the Earl of *Dudley's* will for the maintenance of Lord *Ward*, herself, and family, and for keeping up the mansion-house at *Himley*. The trustees by their bill further stated that they could not with safety act in the premises without the sanction and indemnity of the Court, and they therefore prayed the directions of the Court therein.

After the filing of this bill a petition was presented by Lady *Ward*, setting forth a number of circumstances shewing

petent to the management of his affairs, the Court upon the petition of the wife to confirm the report, directed the trustees to apply to the Great Seal for a commission of lunacy, and referred it to the Master to inquire what in the meantime would be a proper allowance to be made to the wife.

shewing the state of Lord *Ward's* mind, and the affidavits of physicians in that respect, and praying an allowance out of the annuity given to Lord *Ward* by the Earl of *Dudley's* will.

1833.
Bishop of
EXETER
v.
Lord and Lady
WARD.

Upon the bearing of this petition the Master of the Rolls referred it to the Master, to inquire into the state of Lord *Ward's* mind, and to report thereon to the Court.

The Master reported that he had made inquiry into the matters referred to him; that the affidavits of Dr. *M'Michael*, Dr. *Monro*, and other persons had been laid before him, and that he was of opinion that Lord *Ward* was of unsound mind, and not competent to the management of his own affairs.

A petition was now presented by Lady *Ward*, praying that the Master's report might be confirmed, and that thereupon a proper allowance might be made to her out of the annuity of 6000*l.* to which Lord *Ward* was entitled under the Earl of *Dudley's* will.

Mr. *Kindersley*, for the petitioner.

The MASTER of the ROLLS.

Considering the nature and extent of Lord *Ward's* interest under the Earl of *Dudley's* will, and the report which has been made by the Master with respect to Lord *Ward's* state of mind, I am of opinion that the trustees cannot properly proceed in the execution of the trusts of the will, with reference to Lord *Ward*, unless a commission of lunacy is taken out against him. Let the plaintiffs, the trustees, immediately apply to the Great Seal for such commission. And let it be referred to the

1833.
 Bishop of
 Exeter
 v.
 Lord and Lady
 Ward.

Master to inquire and state what would in the meantime be a proper allowance to be made to Lady *Ward*, out of the 6000*l.* a year, for maintaining Lord *Ward*, herself, and family, and for keeping up the mansion-house and park at *Himley*.

The Master having accordingly reported that 3000*l.* a year would be a proper sum to be allowed to Lady *Ward* for the purposes before mentioned, that report was subsequently confirmed by the Master of the Rolls, after an ineffectual opposition on the part of Mr. *James*, who, as counsel for Lord *Ward*, applied that the drawing up of the order might be stayed till the result of the then pending petition for a commission of lunacy should be known. That petition came on very shortly afterwards before the Lord Chancellor, who heard the matter in his private room. His Lordship ultimately refused the application; and the parties thereupon, by arrangement among themselves, declined to take any further proceedings under the orders made at the Rolls.

1833.
PROUDLEY
v.
FIELDER.

The marriage took effect, but no settlement was ever executed. The wife died in the husband's lifetime without issue, and without having made any appointment of her separate property; and the husband took out administration to her estate. The husband having subsequently died, the bill was filed by the next of kin of the wife against the executors of the husband's will, and against certain of his legatees; and it prayed a declaration that, upon the true construction of the articles, the Plaintiffs were entitled to the wife's property in the funds, as if she had not been married.

Mr. Pemberton and Mr. Dixon, for the Plaintiffs.

Mr. Bickersteth, Mr. Kenyon Parker, and Mr. H. J. Perry, for the Defendants.

The MASTER of the ROLLS.

These monies were to be for the sole and separate use of Mrs. *Leader*, as if she were sole and unmarried. This expression has no reference to the devolution of the property after her death. She is to retain the same absolute enjoyment of the monies, and is to have the same power of disposition over them, as if she were sole and unmarried; but there is not one word here to vest the property after her death in her next of kin, or to defeat the right which her surviving husband is entitled to acquire as her administrator.

1833.

HORDE v. The Earl of SUFFOLK.

ROLLS.
 July 27.
 Aug. 5.

THE will of *Ann Southern*, after bequeathing her worldly property of every kind and description to the Rev. *George Bissett* (whom she appointed her sole executor), in trust for the purposes thereafter mentioned, directed her executor to pay certain pecuniary legacies, and, among others, one of 100*l.* to *Caroline Anne Horde*, and then proceeded as follows:—"In the next place I desire that, out of the residue of my property, my said executor will pay, or cause to be paid, to the aforesaid *Caroline Anne Horde*, over and above her said legacy, the sum of 180*l.* annually during the term of her natural life, to be by her distributed in charity according to her own discretion and judgment, either to private individuals or public institutions, in such sum or sums, way and manner, as she shall from time to time choose, without limitation or control from any person whomsoever. Next I desire that my said executor will pay, or cause to be paid, to *Amelia Wrenford*, now living at *Stow* in *Gloucestershire*, the sum of 20*l.* annually for the term of her natural life, for her own use and benefit. All the remainder of my property now vested, or hereafter to be vested in the public funds (and it is my will that all the money I may possess should be so vested in the public funds), I desire that my said executor will pay or transfer, or cause to be paid or transferred, unto the Right Honourable Ladies *Elizabeth Howard*, *Julia Catharine Howard*, and *Jane Elizabeth Howard*, the three eldest daughters of the Right Honourable *Thomas Earl of Suffolk and Berkshire*, to be by them the said ladies, and the survivors and survivor of them, and the executors, administrators,

Where annual sums were bequeathed to persons, to be distributed in charity, at the discretion of the legatees, either to private individuals or public institutions, the Court declared that the legacies did not fail, but that a scheme was unnecessary; leaving any of the parties at liberty to apply, as there might be occasion.

and

1833.

HORDE

v.

The Earl of
SUFFOLK.

and assigns of such survivor, and his, her, or their personal representative or representatives, for ever continued at interest; and the dividends, interest, and proceeds thereof from time to time arising, given away in charity either to individual persons or to public institutions, in such sums, way and manner as, according to their own discretion and judgment, they shall think fit, without the interference or control of or from any person whatever. Further it is my will, that if the aforesaid *Amelia Wrenford* shall die before the said *Caroline Anne Horde*, then and in that case her annuity of 20*l.* a year shall be paid to the said *Caroline Anne Horde* during the term of her natural life, to be applied by her to charitable purposes, as her other annuity of 180*l.* I desire also, that whenever the said *Caroline Anne Horde* shall depart this life, my said executor the Rev. *George Bissett* shall pay or transfer, or cause to be paid or transferred, the said annuity of 180*l.*, and so likewise the said annuity of 20*l.* a year given to the said *Amelia Wrenford*, when the same shall drop in by her death, in case she shall survive the said *Caroline Anne Horde*, to the aforesaid Ladies *Elizabeth Howard*, *Julia Catharine Howard*, and *Jane Elizabeth Howard*, or to the survivors or survivor of them, and the executors, administrators, and assigns of such survivor, and his, her, or their personal representative or representatives for ever to be given away in charity in the same manner, according to their discretion, as the rest of the money which I have directed my aforesaid executor and trustee to pay or transfer to them, and the dividends, interest, and profits thereof; so that it is my intention, that after the deaths of the said *Caroline Anne Horde* and *Amelia Wrenford*, and after payment of the legacies aforesaid, and my just debts, funeral charges, and testamentary and trustees' expenses, the whole residue of my property, whatever it may be or consist of,

of, shall be paid or transferred to the said Ladies *Elizabeth Howard*, *Julia Catherine Howard*, and *Jane Elizabeth Howard*, their executors, administrators, or assigns, for the charitable purposes hereinbefore described."

1833.

 HORDE
 v.
 The Earl of
 SUFFOLK.

The Rev. *George Bissett* having died in the testatrix's lifetime, the testatrix by a codicil substituted the Earl of *Suffolk* as her executor. *Amelia Wrenford* died shortly after the death of the testatrix, and the bill was filed by *Caroline Ann Horde*, and the Ladies *Howard* against the Earl of *Suffolk*, for the purpose of having the annuities of 180*l.* and 20*l.*, and the residue of the testatrix's personal estate, applied in the manner directed by the will.

The Master having found that the testatrix died without leaving any next of kin, the Attorney-General claimed for the Crown on the ground of a failure of the charitable bequest; and the question was, whether that bequest was, in any and what manner, to be executed by the Court.

Mr. *Bickersteth* and Mr. *Whitmarsh*, for the Plaintiffs.

In *Waldo v. Caley* (a), where a fund was directed by the testator to be applied by his widow to charitable purposes generally, the distribution to be at her discretion, with the advice and assistance, but not under the control of the trustees of the will, Sir *William Grant* declined to direct any scheme for a charity, and decided that the disposition of the fund was at the absolute discretion of the widow. The present is a stronger case than *Waldo v. Caley*, for here the disposition of the fund is expressly left to the discretion of the legatees, without limitation or control from any person whom-

(a) 16 *Ves.* 206.

1833.
 HORDE
 v.
 The Earl of
 SUFFOLK.

whomsoever. The fund is to be distributed at all events in charity; but the objects of the charity, and the proportions in which it is to be distributed to the different objects who may be selected, are left entirely to the discretion of the legatees. This is not a case where a legacy is expressly given in trust for purposes so vaguely defined that the Court cannot execute the trust, like *Vezey v. Jamson* (a); neither is it a bequest given for private charity, like *Ommanney v. Butcher* (b); nor is it a case where the testator intended to create a charitable trust, but that intention was too indefinitely expressed to enable the Court to effectuate it, like *Morice v. The Bishop of Durham*. (c) There is, therefore, a good disposition of the property of the testatrix for charitable purposes.

Mr. Wray, for the Crown.

In *Vezey v. Jamson* the testator gave the residue of his estate to his executors upon trust to dispose of it at their pleasure, either for charitable or public purposes, or to such person or persons as they should in their discretion think fit. Charitable, as contradistinguished from public purposes, must mean purposes of private charity, and then the direction is exactly like that in the present case, which is for the distribution of the fund in charity at the discretion of the legatees, either to private individuals or for public institutions. *Ommanney v. Butcher* decides that a trust for private charity is such a trust as the Court cannot execute; and generally where, as in the present case, a trust is so vaguely and indefinitely expressed, that, although the testator may have intended to give his property in charity,

(a) 1 Sim. & Stu. 69.

(c) 10 Ves. 522.

(b) 1 Turn. & Russ. 260.

charity, yet *quod voluit non dixit*, and he has failed to give effect to his intention, the next of kin will be entitled; and, as there are here no next of kin, the Crown has the beneficial interest in the fund. *James v. Allen* (a), *Fowler v. Garlike*. (b)

1893.

 HORDE
 v.
 The Earl of
 SUFFOLK.

Mr. *Bickersteth*, in reply.

The MASTER of the ROLLS.

Aug. 5.

This case appears to me not distinguishable from *Waldo v. Caley*. (c) In that case Sir *William Grant*, considering that the widow had an absolute discretion as to the disposition of the fund, made a declaration accordingly; and thinking a scheme unnecessary, he directed that any of the parties should be at liberty to apply as there might be occasion. This case was afterwards appealed to Lord *Eldon*, and application was made to him to stay any distribution of the fund until the appeal should be determined. This application was refused, and the appeal was afterwards abandoned. I shall follow a precedent so entirely in point, and declaring that the distribution of the several charitable bequests under the will is left to the absolute discretion of the several legatees, I decline directing any scheme, leaving to any party liberty to apply as there may be occasion.

(a) 3 *Mer.* 17.

(c) 16 *Ves.* 206.

(b) 1 *Russ. & Mylne*, 232.

1893.

ROLLS.
Aug. 1.

JAQUES v. JOHNSON.

A testator directs the produce of his real estate to be invested by his executors in their own names in 4 per cent. consols. He then directs them to transfer the 4 per cent. consols and 3 per cent. consols, then standing in his name, to the said account in their own names, and afterwards disposes of "the said 4 per cent. trust stock." This disposition, under the special provisions of the will, includes the 3 per cent. consols which were standing in his name at the making of the will.

THOMAS ROBERTS by his will directed his executors, within six months after his decease, to sell his freehold estate at *London Colney*, and out of the money arising from such sale to pay the legacies therein mentioned. The testator then proceeded in these words: — I will, that after deducting the several above-mentioned sums, and my debts and funeral expenses, from the produce of the said sale, they buy the remainder or balance into the 4 per cent. consols in their own names, but for the uses and trusts hereafter to be named. And I also desire they will at the same time, or sooner if more convenient to themselves, transfer the several 4 per cent. consols and 3 per cent. consols, now standing in my name, as of *Milbank Street Westminster*, to the said account in their own names, and for the uses and trusts thereby intended; that is to say, that they do within fourteen days after receiving the half-yearly dividends at the Bank, pay one half thereof to my sister *Ann Jaques*, for her own use, benefit, and advantage, and not subject to the debts or engagements, or liable to the control of her present or any future husband, and her receipt only to be a discharge for the same; and to pay the other half of the said dividends unto my dear wife *Elizabeth Roberts*, formerly *Elizabeth Jones* widow. And at and after the death of my said sister, I direct that the one half of the said 4 per cent. trust stock be sold and disposed of as follows: — To *Emma Johnson* the daughter of one of my executors, or her representative, the sum of 600*l.* of lawful money, to *Anna Scott* the daughter of my other executor, the
sum

sum of 400*l.*, and the remainder to be disposed of agreeably to the will of my said sister. And on the death of my dear wife, her half of the stock to be disposed of as follows : — 100*l.* thereof to be transferred to the use of her nephew *Charles Jaffrey*, wire-worker; 500*l.* thereof to be transferred to the use of her niece *Sophia Watson*, and 200*l.* to be transferred to the use of her nephew *George Jaffrey*, and whatever surplus there may remain to be disposed of as she may please to will the same. And, lastly, I give and bequeath unto my dear wife aforesaid all my plate, linen, china, household furniture, books, horses, cows, and all other effects of what kind or nature soever not before disposed of, and for her own use, benefit, and advantage, and to dispose of the same as she thinks proper, without molestation or interruption.”

1833.

JAQUES

v.

JOHNSON.

On the death of the testator, a bill was filed to have his estate administered according to the trusts of the will. The will was not duly executed so as to operate upon his real estates, which therefore descended upon his sister *Ann Jaques*, as his heiress at law. Under an order made in the progress of the suit, two sums of stock, one of 3½ per cent. consols into which the testator's 4 per cent. consols had been converted by act of parliament, and the other, being his 3 per cent. consols, were transferred by his executors into Court: and at the hearing of the cause it was declared that the testator's sister *Ann Jaques*, and the husband of his widow *Elizabeth* (who had subsequently married a person of the name of *Grey*), were entitled to the dividends of both the sums of stock in equal moieties during the respective lives of the legatees; and on the death of either, liberty was reserved to any person interested to apply.

1833.

JAQUES
v.
JOHNSON.

Ann Jaques died in *April* 1833, having previously appointed all her personal estate which under her brother's will she had power to dispose of, unto her husband *John Jaques*. On the death of *Ann Jaques* a petition was presented by the husband and personal representative of *Elizabeth Grey*, formerly *Elizabeth Roberts* (now also deceased), praying that the moiety of the 3 per cent. consols, the dividends whereof had been received by *Ann Jaques* during her life, might be declared not to have passed under her will, but to have vested in the petitioner in right of his late wife *Elizabeth*, as the residuary legatee of her former husband *Thomas Roberts*. A cross petition was at the same time presented by *John Jaques*, claiming the stock in question by virtue of the appointment in his wife's will.

The single question raised on the two petitions was, whether under the bequest over, in the will of *Thomas Roberts*, of "the one half of the said 4 per cent. trust stock," his 3 per cent. consols were to be considered as included?

The argument on both sides consisted entirely of verbal criticism on the peculiar form and language of the different clauses in the will, and an examination of the general scope and purpose of its provisions.

Mr. *Pemberton* and Mr. *Jacob*, for the representative of *Elizabeth Grey*.

Mr. *James Russell*, for *John Jaques*.

The MASTER of the ROLLS.

In collecting the intention of the testator upon this point, the will is to be considered as if it were duly executed,

cuted, so as to pass real estate. The testator first directs the residue of the produce of the sale of his leasehold estate to be invested by his executors in the 4 per cent. consols in their own names, but for the uses and trusts thereafter to be named. He then directs his executors to transfer the several 4 per cent. consols and 3 per cent. consols then standing in his name to the said account in their own names, and for the uses and trusts thereby intended.

1853.

 Jacobs
 v.
 Johnson.

The question is, what the testator means "by the said account in their own names and for the uses and trusts thereby intended?" Does he or not mean that the 3 per cents. are to be converted into 4 per cents., so as in that sense to form but one account, to be applied to the uses and intents expressed?

In the first place he directs the trustees to pay one half of the half-yearly dividends to his sister and the other half to his wife. It is plain he means the dividends of the whole trust fund constituted by the produce of his freehold estate and the transfer of the 4 per cents. and 3 per cents. It is a circumstance to be remarked, though but a slight one, that he speaks of the dividends as one half-yearly payment, although, if the trust fund consisted of 4 per cents. and 3 per cents., the dividends of which are payable at different times, that would be two half-yearly payments. Then after the death of his sister he directs that one half of the said 4 per cent. trust stock shall be sold, and he says nothing of the 3 per cent. stock. Is it not to be intended that he means the half of that trust stock, the dividends of which were to be paid by the trustees to his sister during her life, and which he thus describes as "the said 4 per cent. stock?" On the death of his wife he directs the other

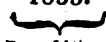
1893.
JAQUES
P.
JOHNSON.

half of his trust stock to be disposed of, and to this disposition the same observations apply.

It is further to be remarked that, unless this construction be adopted, the testator makes no disposition of the 3 per cent. stock, although it may pass by the residuary clause in his will. This, however, is not a probable intention, considering that the 3 per cent. consols were directly in his view, and at all events disposed of expressly during the lives of his wife and sister.

Upon the whole, therefore, I am of opinion that it was the intention of this testator that his 3 per cent. consols should be converted into and form one common fund with his 4 per cent. consols, and that he intended them to pass by his will under the description of the said 4 per cent. trust stock.

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GITTINGS v. M'DERMOTT.

ROLLS.
July 29.

L. C.
1834.
May 22.

THE will of *Charles Stone* contained the following bequest:—"I give and bequeath to the children of my sister the late *Elizabeth Wall*, or to their heirs, the following sums, vested in the Navy 4 per cent. public funds; that is to say, to *Lavender Wall* 100*l.*; *Edward Wall* 200*l.*; *William Wall* 200*l.*; *Sarah Thornby* her eldest daughter 200*l.*; *Charlotte Brown* her youngest daughter 200*l.*; *Edward Wall* her grandson 100*l.*; amounting in the whole to 1000*l.* stock." The testator, after giving various other specific and pecuniary legacies, disposed of the residue of his property as follows:—"All the remainder of my property of whatever description in the public funds, arrears of pay, half-pay, and allowances, and whatsoever effects I may die possessed of, after payment of all bequests and debts, I give and bequeath in equal shares to each of my dear sisters, viz. to my very dear sister *Mary Stewart* one half, and to my sister *Sarah Gittings* the other half of the said property, and upon their deaths respectively to their heirs."

A testator gave to the children of his sister, the late *E. W.*, whose names he enumerated, "or to their heirs," certain legacies. Three of the children died in the lifetime of the testator: Held, that the legacies to these children did not lapse, but that their next of kin took by substitution at the death of the testator.

The same testator gave all the residue of his property "in equal shares to each of his sisters, *M. S.* and *S. G.*, and upon their deaths respectively to their heirs." Both sisters died in the lifetime of the testator: Held, that the next of kin

On

Mary Stewart and *Sarah Gittings*, the testator's sisters, and three of the legatees of the 1000*l.* stock, died in the lifetime of the testator. The bill was filed by *Charles Gittings*, who was the heir at law and one of the next of kin of *Sarah Gittings*, and also one of the next of kin of the testator, against the several other parties claiming interests under the will.

of *M. S.* and of *S. G.*, living at the death of the testator, were entitled by substitution to the gift of the residue.

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On the bequest to the children of *Elizabeth Wall* a question was raised, whether the legacies given to such of them as had died in the lifetime of the testator had lapsed, or whether the heirs or next of kin of the deceased children were, in the event which had happened, entitled by substitution.

Mr. *Bickersteth*, for the Plaintiff, cited *Corbyn v. French* (a), for the purpose of shewing what the inclination of Lord *Alvanley*'s opinion was in a case of this nature, although it was unnecessary expressly to determine the point in that case. Lord *Alvanley* there said, "I will not determine, because it is not necessary, that where a legacy is given to a person 'or to his representatives,' it can mean any thing but in case of his death in the life of the testator." The word "heirs" was in this case equivalent to "representatives," and it was clear from this observation what construction that learned Judge would have put upon the words of the bequest in the present case.

The MASTER of the ROLLS said it was clear that the word "or" implied a substitution, and that there was consequently no lapse. The word *heir* must, in respect of personal property, be taken to mean next of kin.

On the residuary clause,

Mr. *Bickersteth* and Mr. *Sharpe*, for the Plaintiff, argued that the interest given to the testator's sisters could no more be taken to be an absolute interest than that given to the legatees of the stock. It would be a strange construction to hold that the gift of the stock had not lapsed, but that there was a lapse of the gift of the residue, although

(a) 4 *Ves.* 418.

though in both cases the testator had equally manifested his intention of extending his bounty to the heirs of the legatees in the event of their death. If the residuary gift should be held to have lapsed, the Plaintiff was entitled to a share of the residue as one of the next of kin of the testator; if there was a substitution, he was entitled to a moiety of that residue, whether he took as heir, or as sole next of kin of one of the testator's sisters.

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Mr. *Booth*, for a Defendant in the same interest as the Plaintiff.

Mr. *Pemberton* and Mr. *Turner*, for the Defendant *M'Dermott*, who was one of the next of kin of the testator, contended that the gift to the heirs of the residuary legatees on their respective deaths was plainly a limitation, and not a substitution; and this limitation was made in language which, as applied to personal estate, gave the absolute interest to the person named as the first taker. In *Robinson v. Fitzherbert* (a) the limitation resembled that in the present case; there the interest of a sum of money was given to *A.* for life, and at his death to devolve to the heir of his body, with remainder over, and it was held that *A.* took an absolute interest. Now, whether a limitation of personal estate were made to a person for life, with remainder to the heirs of his body, or, as in this case, with remainder to his heirs; whether it were made in language which, with reference to real estate, would give an estate tail or an estate in fee, the person intended to take as tenant for life was in either case entitled to the absolute interest. In *Britton v. Twining* (b), Sir *William Grant* held that where there was nothing to qualify the words "heirs of the body," those words must be taken to be used

(a) 2 Bro. C. C. 127.

(b) 3 Mer. 176.

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used in their strict technical sense; and that where words were so used as to give an estate tail in land, they would pass an absolute interest in personal estate. So in *Mounsey v. Blamire* (a), where the testator gave a pecuniary legacy to his *heir*, there being nothing in the context of the will to control the ordinary and legal sense of that word, his Honor was of opinion that the heir, and not the next of kin, was entitled. In the present case there was nothing to qualify the word *heirs*; it was so used as to give the absolute interest to the testator's sisters, and the gift having lapsed by the death of the testator's sister in his lifetime, the residue was distributable among his next of kin. *Tidwell v. Ariel* (b) was a case very similar to the present. There the testator gave, among other legacies, a sum of 600*l.* to his daughter *Dorothy*; and he directed all these legacies to be paid to the legatees by his trustees at the end of a year next after his decease, or to their several and respective heirs. *Dorothy* died in the lifetime of the testator, and it was held that her legacy had lapsed.

Sir C. Wetherell, Mr. G. Richards, Mr. Cooper, and Mr. O. Anderdon, for other parties.

Mr. Bickersteth, in reply.

Tidwell v. Ariel was decided upon the special circumstance of the direction by the testator to pay the legacies at the end of a year after his decease. The alternative of payment to the representatives of the legatees at the end of a year after the testator's death was perfectly consistent with an absolute gift to *Dorothy*, for she might have died within that period. The Court expressly took that distinction, and intimated that, had it not been for the direction to pay at the end of a year after

(a) 4 *Russ.* 384.

(b) 3 *Mad.* 403.

after the testator's death, it would have been a case of substitution, and not of absolute gift. *Tidwell v. Ariel*, therefore, is in reality an authority for the Plaintiff.

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The MASTER of the ROLLS.

A will speaks at the death of the testator, unless his intention be clearly manifested to the contrary. When, therefore, the testator gives the several legacies of stock to the children of his sister or to their representatives, he plainly intends that if any of the children should not be living at his death, their representatives should take by substitution. This is the effect of the word "or," which differs wholly from that which must have been given to the bequest, had the word "and" been used.

With respect to the residuary clause, a question is also made, whether a substitution is intended, or whether an absolute interest is given to the two sisters. Now it is impossible to read this residuary clause, and not to see that the words plainly import an intention, on the part of this testator, to give the residue of his estate, by way of substitution, upon the respective deaths of his sisters. It is clear that the testator did not intend that the interest of the sisters should exhaust the whole property. He gives the residue of his property in equal shares to each of his sisters, and upon their deaths respectively to their heirs. What is the plain import of these words? Not that the sisters were to take the absolute property; but that, upon their deaths respectively, whenever such deaths should happen, the property should go to their heirs. I am of opinion, therefore, that this gift did not lapse upon the death of the sisters in the lifetime of the testator, but that it went to those who would have taken it by succession had the persons to whom the life interest was given survived the testator.

With

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With respect to the import of the word "heirs," its construction must be governed by the nature of the property; and this property being personal, those who succeed to it are not the heirs at law, but the next of kin. In the case of *Mounsey v. Blamire*, the word "heir" was a mere word of description, and it was impossible to give to that word any other than its legal and technical signification. There happened to be co-heirs, and the Court was consequently of opinion, to which opinion it still adheres, that such co-heirs, as *personæ designatæ* under the word "heir," were entitled.

L. C.
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The Defendant *M'Dermott* appealed from this decree.

The case having been opened, on the part of the Appellant, by Mr. *Jacob* and Mr. *Turner*, the Lord Chancellor considered it unnecessary, for the reasons stated in his judgment, to hear the other side.

The LORD CHANCELLOR, after stating the will, proceeded as follows:—

It appears that the testator was a private soldier, who, having by his sober and steady demeanour raised himself in the service, left 15,000*l.* by the will which is the subject of this appeal. In adverting to his merits and his success, it is difficult to avoid regretting that perhaps his only reverse of fortune should finally have brought his hard-earned property into this Court; for whatever doubts may be entertained as to where he designed it to go, it may be pretty confidently affirmed that *we* were not in any degree the objects of his bounty. Being disposed, however, to keep it here as short a time as possible, I shall not call on the counsel for the

Respondents,

Respondents, having no doubt at all on one part of the case, and on the other, though far from being so clear, having not a sufficient doubt to require further argument in support of the decision of the Master of the Rolls.

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The will presents two questions for consideration.

First, do the legacies given to *Elizabeth Wall's* children respectively, "or to their heirs," lapse as to such children as died in the lifetime of the testator, or vest in their heirs? Who shall be intended by the word "heirs" is not here disputed; the question of lapse only is before the Court.

Secondly, do the equal shares of the residue given to the testator's sisters, "and upon their deaths respectively to their heirs," lapse, or go to the persons, whoever they may be, who shall be intended heirs?

Although I am not aware that it has ever been judicially determined that legacies "to *A.* and *B.*, or to their heirs," are to be read, "to *A.* and *B.*, and if either predecease, then to his heirs," so as to prevent a lapse; yet I think that, both upon reasonable grounds of construction, and upon the authority of several *dicta*, there can be no doubt of such being the true sense of the expressions. The force of the disjunctive word "or" is not easily to be got over. Had it been "and," the words of limitation would, of course, as applied to a chattel interest, have been surplusage; but the disjunctive marks as plainly as possible that the testator, by using it, intended to provide for an alternative bequest; namely, to the legatees if they should survive; and if they should not, to their heirs. It is no doubt true, that a testator cannot exclude a lapse by using negative provisions, as by saying, "This legacy shall not

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not lapse by predecease of the legatee." The legacy must be given over to another in that event, in order to prevent its falling into the residue; the intent, without such designation of a substitute, being indeed indicated, but not, for legal purposes, sufficiently expressed to admit of its being carried into effect. And here it may be said, that no distinct substitution is made, inasmuch as the word "heirs" is of ambiguous import when applied to a legacy. But there is really nothing in this objection; for the sense in which this word shall be taken, when applied to personalty, is fixed by many decisions. It designates the heir of the personalty, that is, the next of kin. So Lord *Alvanley* held in *Holloway v. Holloway* (a), though the point was not necessary to be decided; in *Lowndes v. Stone* (b), the Court held that a gift of the residue to the testator's "next of kin or heir at law" carried it to the next of kin; and in *Vaux v. Henderson* (c), a gift of 200*l.* to A., and if he died before the testator, then to his heirs, was held by Sir *William Grant* a gift to the next of kin.

I have, therefore, no doubt that the words provide with sufficient distinctness a substitute for the legatee, if it be admitted that the event of her predecease appears to have been in the testator's contemplation; and I have already shewn it to be so upon the reasonable construction of the words.

The authorities will be found to support this construction. *Corbyn v. French* (d), decided by Lord *Alvanley*, has been relied on in argument, and is a case of great and recognised authority; but it does not touch or even come near the present question. It was a gift of the

(a) 5 *Ves.* 399.

(b) 4 *Ves.* 649

(c) 1 *J. & W.* 388. n.

(d) 4 *Ves.* 418.

the residue to the widow for her life, and at her death part of it to *B.*, or to her proper representative if *B.* should not be living at the widow's death; and other equal parts of it to *C.* and *D.* or their representatives or representative; and *C.* having died in the testator's lifetime, the question was, if his share lapsed. Lord *Alvanley* held, and most soundly held, that the substitution of the representatives was only intended to meet the same event in respect of *C.*'s and *D.*'s shares as in respect of *B.*'s; namely, their severally predeceasing, not the testator himself, but his widow; and he decided the legacy of *C.* to be lapsed. Can it be pretended that the same decision would have been given had the gifts been to *B.*, *C.*, and *D.* respectively, without any previous life interest to the widow, and without any reference either to her decease or to their surviving her? Clearly not; the only grounds of the judgment would then have altogether failed.

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The principle which ruled the case of legatees of the *corpus* predeceasing one who took a life interest in the first instance, has been applied to the case of legatees dying before the term of payment, when that was a given time fixed by the will, and when the substitution was made with a reference to the first taker's dying before that time. This was decided in *Tidwell v. Ariel* (a), by the Master of the Rolls.

In that case the testator gave a legacy to his daughter *A.* among several other legacies to different persons named in his will, all which legacies he directed to be paid by his trustees one year after his death, "or to their several and respective heirs;" and *A.* having predeceased the testator, his Honor decided that her legacy

was

(a) 3 *Mad.* 403.

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was lapsed. The decision is important, first, because it shews that the word "heirs" being used, did not raise any doubt as to the party substituted, its meaning being sufficiently definite; and, secondly, because his Honor clearly intimates how he would have determined the question of lapse, had the substitution referred to the legatee's dying, not before the time of payment arrived, but before the testator died. It had been contended that the substitution was inconsistent with a pure personal gift to the legatee, and must be taken as carrying the legacy to *A.*'s representative on his decease. His Honor said, "If the direction had been, that the legacies should, at the testator's death, be paid to the legatees, or their respective heirs, the inconsistency contended for would have existed;" that is, such a gift would have prevented a lapse, and entitled the legatee's next of kin. Now the case thus supposed by his Honor is precisely and in terms the case before the Court.

Another case, which came before the Vice-Chancellor in 1829 (*a*), received much discussion, and the opinion delivered by his Honor plainly shews that, had the bequest been to *A.* or to his heirs, the gift over would have precluded a lapse. That was a gift "to *A.* or to his heirs, executors, administrators, or assigns," which was justly held to be void for uncertainty, *A.* having predeceased the testator; because it was said that "assigns" meant some persons to be designated by the legatee, while "heirs" meant those who derived no title from him; and executors and administrators were added to the others, so that the whole was held quite uncertain, and a lapse was inevitable. The Vice Chancellor throughout held, that to such words he could not give the sense of next of kin, because no case authorised him

(*a*) *Waite v. Templer*, 2 *Sim.* 524.

him to do so, though he distinctly admitted that "heirs" alone had received this sense by judicial determination; and no one can carefully read the judgment given by his Honor, without coming to the conclusion that, had the gift been to "*A.* or his heirs," the decision would have been the other way.

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The second point is not so free from difficulty. It must be admitted that the expression "to *A.* and *B.* or their heirs," denotes distinctly and according to its natural import the alternative of *A.* and *B.* not surviving to take, and provides for that event. The words "to *A.* and *B.* and upon their death to their heirs," are far from carrying the same alternative sense if they stand alone. On the contrary, they rather seem to point at succession than at substitution; rather look like a gift to *A.* and *B.* during their lives, and after their decease respectively to their heirs. The use of the conjunctive "and" seems to point that way, but still more when it is followed by the words "upon their death," which seem to be synonymous with "at their death," and not with "in case of their death," which would denote predecease. But if such be the construction of the gift, that is, if it be to the legatees for life, and after their decease to their heirs, it carries the whole interest to the legatees, and makes a lapse on their predecease. That such would be the true construction of the bequest of this residue in the general case, and if it stood alone, I can have little doubt, though I am not aware of any decision exactly in point. But we must look here to the whole instrument, examine the other parts as well as the clause in question, and attend also to the whole of that clause as well as to the particular words of limitation.

- § The testator is giving the residue to his two sisters in equal shares; and it seems much more likely that he should

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should have intended to give the children of *Sarah Gittings* their mother's share in case they survived him and she predeceased him, as he seems to have provided for all his other nephews and nieces, and had left nothing to *Sarah Gittings'* family. Moreover nothing is said directly of the gift to the two sisters for life; the residue is given to them in terms which would carry the *corpus*, unless controlled by the words that follow—"and upon their deaths." But, chiefly, it is necessary to regard the other provisions of the will, the general scheme of it, and the manner in which the testator had previously taken precautions to prevent all lapse. He gives legacies to the children of his sister *Elizabeth Wall*, so as to prevent a lapse by their predeceasing himself, in the way I have already shewn. It appears improbable that, having thus confined those children to 100*l.* or 200*l.* each, he should afterwards allow the bulk of his fortune to go amongst them equally with the representatives of his most favoured sisters; and it seems still more improbable, that he should have taken effectual care to prevent a lapse of the small stock legacies given to the *Walls*, and taken no care at all to prevent a lapse of the whole remainder by the predecease of his sisters.

This consideration makes it quite impossible to doubt that the testator, when he used the words in giving the residue "upon their deaths respectively to their heirs," intended the same thing as when, in giving the stock legacies, he had made use of the words "or to their heirs."

It is quite true, that the expression "upon their deaths," has never in any case been construed as equivalent to "if they die," or "in case of their deaths," and I by no means intend to state that it is equivalent to those expressions. I have indeed said that, if these
 words

words had stood alone, I could not have considered them as denoting predecease; nevertheless it must be admitted that the phrase has no meaning at all, if it is taken as implying limitation and not substitution, for no one can take what has been given to another, until the death of that other, and while any legatee exists, no one can be his heir. It may be further observed, that giving to *A.*, and on his death to his heirs, refers to two things which must take place without any such provision, the death of *A.*; and his heirs taking after him, that is, the property going to those to whom the law gives it; so that it is only saying, "let those take it who may be entitled to take it." But I must again observe, that my opinion as to the construction to be put upon the words in question rests not upon the words taken by themselves, but upon the whole context, and the preceding parts of the will. The current of authority upon analogous cases, there being none upon the expressions here employed, would certainly lead to the conclusion, that if the gift stood alone, a lapse could not easily be prevented; and my opinion is formed upon the preceding argument, by which I have, I apprehend, shewn that the true construction of the foregoing gifts to the *Walls* precludes a lapse as to those legacies, and that there arises from thence an inference not to be avoided or resisted, that the words employed touching the residue must be taken in a like sense.

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Where, on the failure of a particular gift to one for life with remainders over, the next limitation in the deed was to the settlor, or such persons as he should appoint, and in default of appointment, to such person or persons as should at the time of his death be his next of kin; and the settlor died before the tenant for life, without having made any appointment; the tenant for life, who was one of the settlor's next of kin, was held not to be excluded from the benefit annexed to that character.

The words "next of kin," used *simpliciter*, and without explanatory context, must be taken to mean next of kin according to the statute of distributions.

BY an indenture, dated the 17th of *July* 1813, and made between *Peter Elmsley* of the first part, *Alexander Elmsley*, his brother, of the second part, and *John Adolphus Young* and *Walter Young* of the third part, reciting, among other things, that the said *Peter Elmsley*, conceiving it to have been the intention of his uncle *Peter Elmsley Esq.*, deceased, to have made some provision for the said *Alexander Elmsley* over and beyond what was specified in the will of his said uncle, had proposed to settle the sum of 2500*l.* 3 per cent. bank annuities upon the said *Alexander Elmsley* and his issue in manner thereafter mentioned; it was witnessed that the said *Peter Elmsley* assigned unto the said *John Adolphus Young* and *Walter Young*, their executors, administrators, and assigns, the said sum of 2500*l.* 3 per cent. bank annuities, upon trust to pay the interest and dividends thereof to the said *Alexander Elmsley* and his assigns during his life, and after his decease upon trust to pay, assign, and transfer the same unto and among the child or children of the said *Alexander Elmsley*, by any woman with whom he might at any time thereafter intermarry in manner therein expressed: but in case there should not be any child of the said *Alexander Elmsley* by any woman with whom he might intermarry as aforesaid, who being a son should attain the age of twenty-one years, or being a daughter should attain that age or marry, then the said *John Adolphus Young* and *Walter Young*, and the survivor of them, his executors, administrators, and assigns, should from and immediately after the decease of the said *Alexander Elmsley*, and such failure of issue

as

as aforesaid, stand and be possessed of and interested in the said sum of 2500*l.* 3 per cent. bank annuities, upon trust to pay, transfer, and assign the same unto the said *Peter Elmsley*, party thereto, in case he should be then living, and in case the said *Peter Elmsley* should not be then living, then unto such person or persons, and to and for such ends, intents, and purposes, as he the said *Peter Elmsley*, at any time or times during his natural life, by any deed or writing to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil thereto, should direct or appoint; and in default of such direction or appointment, upon trust to pay, transfer, and assign the said sum of 2500*l.* 3 per cent. bank annuities to such person or persons as should at the time of the decease of the said *Peter Elmsley* be the next of kin of him the said *Peter Elmsley*, and to and for no other use, trust, intent, or purpose whatsoever.

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Peter Elmsley died on the 8th of *March* 1825, without having made any appointment, leaving his brother *Alexander Elmsley* and a nephew and two nieces, children of *John Elmsley* a deceased brother, surviving him. *Alexander Elmsley* died on the 4th of *August* 1831, unmarried, and without issue. The bill was filed by the nephew and nieces of the settlor against the surviving trustee of the settlement and the personal representatives of *Alexander Elmsley*.

Two questions were made in the cause; first, whether the limitation over was, in the events which had happened, a limitation to the next of kin of the settlor, exclusive of *Alexander Elmsley*; and, secondly, whether, if *Alexander Elmsley* were not excluded, he was entitled to the whole as nearest of kin, or to a moiety as one of

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the next of kin, the representatives of the deceased brother being entitled *per stirpes* to the other moiety.

Mr. *Bickersteth* and Mr. *Campbell*, for the Plaintiffs.

The limitation to the next of kin is to take effect in the events of the death of *Alexander Elmsley* without issue, and no appointment by the settlor. These events have happened; and it is plain that *Alexander* himself could not be intended to take or participate in the gift to the next of kin. *Bird v. Wood* (a) is a case very similar in its circumstances to the present. There the testatrix bequeathed a fund to her daughter for life, and, after her decease, to such persons as she should appoint, and, in default of appointment, to the testatrix's own next of kin according to the statute of distributions; and, the daughter having died without children, and without having made any appointment, it was held that the testatrix's next of kin, exclusive of the daughter, were entitled to the fund. So in *Jones v. Colbeck* (b) the testator's daughter, the tenant for life, was held not to be included in the expression "nearest relations," to whom the fund was given in the event of the death of the daughter without children. *Briden v. Hewlett* (c) is an authority to the same effect. If, however, the Court should be of opinion that *Alexander Elmsley* is not excluded under this settlement, then, as the words "next of kin" are used *simpliciter* without any explanatory context, they must, according to the recent decision in *Hinckley v. Maclarens* (d), be taken to mean next of kin according to the statute of distributions. The representatives of *Alexander Elmsley* will, consequently, be entitled to one moiety of the fund, and the nephew

(a) 2 *Sim. & Stu.* 400.

(b) 8 *Ves.* 38.

(c) p. 90. *infra*.

(d) 1 *Mylne & Keen*, 27.

nephew and nieces of the deceased brother to the other moiety.

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Mr. *Tinney* and Mr. *Lovat*, for the personal representative and residuary legatee of *Alexander Elmsley*.

The first question raised is, whether *Alexander Elmsley*, or those who represent him, have, in the events which have happened, any claim at all; the next, whether, supposing him not to be excluded, his interest extends to the whole or only to a moiety of the settled fund. To support the construction contended for on the other side, there must be added to the words "next of kin," the words "exclusive of my brother *Alexander*." Without this interpolation *Alexander Elmsley* clearly answers the description of "next of kin," and was entitled either to the whole, as the nearest in blood to the settlor, or to a moiety of the fund as one of the next of kin under the statute of distributions. In general, the tenant for life under a will or deed is not excluded from taking or transmitting to his representatives a larger interest, as answering the description of the person or of one of the persons to whom the fund is given over. Thus, in *Holloway v. Holloway* (a) the testator's daughter, the tenant for life of the whole fund, was held to be entitled, with her two sisters, to a share of the fund which was given over to the testator's heirs at law. In *Doe dem. Garner v. Lawson* (b) the testator devised real estate to his nephew for life, and after his decease to such person or persons as should appear and could be proved to be his next of kin, in such proportions as they would, by virtue of the statute of distributions, have been entitled to his personal estate, if he had died intestate. Upon this singular limitation the Court held that the next of kin at the time

(a) 5 *Ves.* 399

(b) 3 *East*, 278.

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time of the testator's death were entitled, though the nephew, to whom a prior estate for life had been given, was one of them. All the cases in which the tenant for life has been excluded, turn upon special circumstances, which do not apply to the present case. In *Jones v. Colbeck* (a), Sir William Grant was of opinion that the testator could not have intended to include his only daughter in the term "relations," and upon that ground the daughter was held to be excluded. In *Bird v. Wood* (b) there is a special circumstance, which is not noticed in the report of that case, and which would seem to have been the ground of your Honor's decision. The bequest over in that case is to the testatrix's own next of kin, according to the statute of distributions, "to be considered as a vested interest from the time of the testatrix's death, except as to any child that might be afterwards born of her daughter." It follows from this direction, that the testatrix intended the grandchildren to take a vested interest in the lifetime of the daughter; and as the grandchildren could only take as next of kin, properly so called, by representation, the testatrix must have intended next of kin exclusive of the daughter. The daughter must necessarily be excluded before the grandchildren could come in; and this was no doubt the ground of your Honor's decision.

If *Alexander Elmsley*, then, be not excluded, the next question is, whether he was not entitled to the whole of the fund, as the nearest in blood to the settlor. It is true that in *Phillips v. Garth* (c) the words "next of kin," without more, were held to mean next of kin according to the statute of distributions; but the decision in that case has been successively disapproved of by

(a) 8 Ves. 38.

(b) 2 Sim. & Stu. 400.

(c) 3 Bro. C. C. 64.

by Lord *Thurlow*, Lord *Eldon*, and Sir *William Grant*, and it was expressly over-ruled by Sir *Thomas Plumer* in *Brandon v. Brandon*. (a) In *Smith v. Campbell* (b) Sir *William Grant* expresses his opinion upon this point in the following language:—“Even if the words were ‘next of kin,’ yet, if there was nothing to shew that the testator had reference to the statute of distributions, or to a division as in the case of intestacy, the inclination of my opinion would be, that the nearest in kindred only are entitled, and that brothers and sisters would exclude nephews and nieces from participating in such a bequest. I know the contrary was determined by Mr. Justice *Buller* in *Phillips v. Garth*, who held, that under the words ‘next of kin,’ two surviving brothers were not alone entitled, but nephews and nieces were to come in with them. That case came before Lord *Thurlow*, but not upon that point, the brothers not appealing from Mr. Justice *Buller*’s decision; but the inclination of Lord *Thurlow*’s opinion was so strong against that of Mr. Justice *Buller*, that his Lordship directed the cause to stand over, that the brothers might have an opportunity of applying to rehear the cause. It was however compromised, and there was no decision of that point. In the case of *Garrick v. Lord Camden* (c), Lord *Eldon*, referring to Lord *Thurlow*’s doubt, states his own also, with regard to that decision of Mr. Justice *Buller*.”

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Mr. *Ellison*, for the surviving trustee of the settlement.

Mr. *Bickersteth*, in reply.

The

(a) 3 *Swanst.* 312.

(c) 14 *Ves.* 372.

(b) 19 *Ves.* 400. S. C. *Coop.*

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The words "next of kin," must be taken to mean next of kin according to the statute of distributions. Upon the other point my present opinion is, that if there be a gift to a tenant for life, with remainder to his children, remainder, if he have no children, to the next of kin at the testator's death, and the tenant for life happen to be one of those next of kin, he is not excluded from taking in that character. The mere circumstance of a partial interest being given to a particular person does not exclude such person from the benefit of a larger or other interest given to him under another description. I shall, however, look into the authorities before I finally decide this point.

Dec. 2.

This day his Honor delivered the following judgment: —

In cases of this nature the inquiry necessarily is, whether the next of kin, who are to take upon the failure of a particular gift to one for life with remainder over, are the next of kin of the testator or settlor living at his death, or the next of kin of the testator or settlor living at the death of the tenant of the particular estate. If the persons who are to answer that description are to be the next of kin at the death of the testator or settlor, and the tenant of the particular estate be then living, and be himself one of the next of kin at that period, he cannot be excluded from the benefit which is annexed to that character. If the next of kin, who are to take upon failure of the gift to the particular legatee or donee, are meant to be the next of kin living at the death of the legatee or donee, it is plain that such legatee or donee could not be intended to be included under that description.

This

This is the principle adopted in the case of *Holloway v. Holloway* and *Jones v. Colbeck*, although the decision in *Holloway v. Holloway* is in other respects questionable. In the case of *Bird v. Wood*, which was before me, the report is too short; the circumstance which governed the decision in that case, which has been referred to at the bar, although noticed in the statement of that case, is omitted in the report of the judgment. In the case of *Briden v. Hewlett (a)*, which was subsequently before me, the testator gave all his property to his mother for the term of her life, with power to appoint the same at her death, and in case she should make no appointment, then "to such persons who would be entitled to the same by virtue of the statute of distributions." The mother survived the testator, and died without having made any appointment, and upon the original hearing of the cause I referred it to the Master to inquire who, by virtue of the statute of distributions, were entitled to take at the death of the testator, and who, according to that statute, were entitled to take at the death of the mother; and upon the hearing of the cause on further directions, I held that the persons to take were those who, by virtue of the statute of distributions, would be entitled at the death of the mother, the term *would* used by the testator being future, and it being evident that it could not be intended that the mother should take under that description.

In this case *Alexander Elmsley*, having survived *Peter Elmsley*, and being one of the next of kin at the death of *Peter Elmsley*, according to the unequivocal expression in the deed, I am of opinion that he cannot be excluded from the benefit which then devolved upon him in that character. As to the effect of the expression

"next

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(a) p. 90. *infra*.

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"next of kin," I had occasion fully to examine that point in *Hinckley v. Maclarens* (a), and I continue of the opinion then expressed, that where the words "next of kin" are used *simpliciter* and without explanatory context, they are to be understood as next of kin according to the statute of distributions.

(a) 1 *Mylne & Keen*, 27.

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 Nov. 23.

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A testator gave his personal estate to trustees, upon trust to convert into money, and invest the same, and to pay the interest to his mother for her life; and after the decease of his mother he gave all his estate and effects to such person or persons as she should by her will direct and appoint; and in case his said mother should die without a will, then to such person or persons as would

THE will of *William Bingham* contained the following bequest: — "I give and bequeath unto my friends *William Briden* the elder, and *William Briden* the younger, all my goods, chattels, money in the funds, personal estate and effects whatsoever and of what nature and kind soever, upon trust, in the first place, to convert into money all and such part of my estate and effects as are not already in money; and, in the next place, to lay out the same in government or landed security, and to pay and apply the interest thereof unto my mother, the wife of *Timothy Hewlett*, during her natural life. And I will and direct that her receipt only be a sufficient discharge for the same, nor shall the same be subject to the control or disposition of the present or any future husband of my said mother. And after the decease of my said mother, I give and bequeath all my goods, chattels, estate, and effects unto such person or persons as my said mother shall by her will

be entitled to the same by virtue of the statute of distributions. The mother survived the testator, and died intestate: Held, that the testator's next of kin at the death of the mother were entitled to the bequest.

will direct and appoint; and in case my said mother shall die without a will, then to such person or persons as would be entitled to the same by virtue of the statute of distributions."

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The testator died, leaving *Jane Hewlett*, his mother, his sole next of kin, who died intestate. The children of *Jane Hewlett's* brother were the testator's next of kin at the death of *Jane Hewlett*; and the same children would have been his next of kin if *Jane Hewlett* had been then dead. The question in the cause was, whether the testator's personal estate belonged to *Timothy Hewlett*, as the husband and personal representative of the testator's next of kin at his death, or to the children of *Jane Hewlett's* brother.

Mr. *Tinney* and Mr. *Norton*, for the personal representative of *Jane Hewlett*, contended, that the testator's mother was entitled as next of kin at the death of the testator, and that the partial interest, which she took under the will as tenant for life with a power of appointment, could not exclude her from the interest which accrued to her as answering the description of the testator's next of kin. Upon this principle it was decided in *Holloway v. Holloway* (a), that a testator's daughter, who had an interest for life in the whole fund, was entitled to share with his other daughters in the residue of that fund bequeathed in trust for such person or persons as should be his heir or heirs. This principle was recognised by Sir *William Grant* in *Jones v. Colbeck* (b), and followed in *Doe dem. Garner v. Lawson* (c), where the tenant for life, a nephew of the testator, was held to be entitled to a share of real estate devised in remainder to such persons as would have taken

(a) 5 Ves. 399.

(b) 8 Ves. 38.

(c) 5 East, 279.

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taken it if it had been personal estate, and the testator had died intestate.

Mr. *Bickersteth* and Mr. *Barber*, for the next of kin at the death of *Jane Hewlett*, insisted that the testator's mother was plainly excluded by the language of this will in the event of her dying intestate; and they relied upon *Bird v. Wood*. (a) In that case the bequest was to the testatrix's daughter for life, and after her death as she should appoint, and in default of appointment to the testatrix's next of kin, to be considered as a vested interest from the testatrix's death, except as to any child afterwards born of her daughter; and it was held, the daughter having died without having had a child, and without making any appointment, that the persons who would have been next of kin at the testatrix's death, if her daughter had been dead without issue, were entitled.

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It is impossible to contend that this testator meant to give the property in question absolutely and entirely to his mother, because he gives it to her for life, with a power of appointment. In case of her death without a will, the testator gives his property to such person or persons as *would* be entitled to it by virtue of the statute of distributions. Entitled at what time? the word *would* imports that the testator intended his next of kin at the death of his mother. It is clear that he meant to exclude his mother from the class who were to take in the event of her intestacy; and no question can, in this case, be raised between the next of kin, exclusive of the mother, at the time of the death of the testator, and the next of kin at the time of the death of the mother; for these are here the same persons.

(a) 2 Sim. & Stu. 400.

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JOHN FRAIN, by his will, dated the 28th of November 1810, duly executed to pass freehold estates by devise, gave and devised all and every his freehold messuages, lands, tenements, and hereditaments, and real estate whatsoever and wheresover, unto his wife *Elizabeth Frain* for and during the term of her natural life; and from and immediately after her decease, he gave and devised all and every his said freehold lands, tenements, and real estates, with the appurtenances, unto his grand-daughter *Elizabeth Horn*, the only child of his the said testator's daughter *Elizabeth Horn*, deceased, late wife of *Charles Horn*, and to the heirs and assigns of his said grand-daughter *Elizabeth Horn* for ever: but, in case his said grand-daughter *Elizabeth Horn* should happen to die under the age of twenty-one years without issue, then over.

A testator gave his real estates to his wife for life, and after her decease to his grand-daughter, the only child of his deceased daughter, her heirs and assigns; but in case she should die under twenty-one without issue, then over: Held, that the grand-daughter, who was the testator's sole heir at law, took at the death of the tenant for life, by descent, and not by purchase.

The testator died in June 1815, leaving his wife *Elizabeth Frain*, and his grand-daughter *Elizabeth Horn*, his sole heir at law, surviving him. *Elizabeth Frain*, the widow, entered into possession of the lands, and died in December 1824. *Elizabeth Horn* attained her age of twenty-one years in 1823, intermarried with *Charles Hatfield* in 1829, and died without issue in June 1830. The Plaintiffs were the heirs of the testator *John Frain*, and also the heirs *ex parte maternâ* of *Elizabeth Hatfield*, and they claimed to be entitled to the lands in question by descent on the death of *Elizabeth Hatfield*, the person last seised, insisting that *Elizabeth Hatfield* took by descent, and not by purchase. The Defendants were the heirs *ex parte paternâ* of *Elizabeth Hatfield*,

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Hatfield, who claimed on the ground that *Elizabeth Hatfield* took by purchase under the will of her grandfather. The husband of *Elizabeth Hatfield* had forfeited his tenancy by the curtesy by a subsequent intermarriage, the lands being of gavelkind tenure.

Mr. *Pemberton* and Mr. *Cooke*, for the Plaintiffs.

The only point in this case is, whether the testator's grand-daughter took by descent or by purchase, and that point must now be considered as settled by the case of *Doe dem. Pratt v. Timins*. (a) The principle established by the cases is, that if a person is entitled to the same quality of estate in the two characters of heir and devisee, he will take by his preferable title of descent: *Couden v. Clerke* (b), *Godolphin v. Abingdon*. (c) It makes no difference whether the devise be subject to a previous estate for life, or be charged with the payment of debts or annuities (*Chaplin v. Leroux* (d)), or whether, as in the present case, there be an executory devise over. In *Hainsworth v. Pretty* (e), there was a devise to the eldest son in fee, upon condition that if he paid not certain specified legacies to the devisor's second son and daughter, the land should go to the second son and daughter, and their heirs. There the Court held, that the devise in fee to the heir, being no more than what the law gives, was void; and that the land descended until the condition became broken, when the limitation to the younger children took effect. So, in the present case, the land descended; and if the grand-daughter had died under twenty-one without issue, the conditional limitation, or executory devise, would have taken effect. In *Doe dem. Pratt v. Timins* the devise

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(a) 1 B. & Ald. 530.

(b) Hob. 29.

(c) 2 Atk. 57.

(d) 5 Maule & Selw. 14.

(e) Cro. Eliz. 833. 919.

was to the heir at law in fee, with an executory devise over in case he did not attain the age of twenty-one; and the Court held that the quality of the estate which he would otherwise have taken as heir was not altered, and that he took therefore by descent and not by purchase. That case settled the point, and must decide the present question; the devise, in fact, being precisely the same in both cases.

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Mr. *Bickersteth* and Mr. *Ellison*, for the Defendants.

There are conflicting decisions on this point, and the reasons given for these decisions cannot be easily reconciled. In *Scott v. Scott* (a), which is briefly reported in *Ambler*, and more fully and accurately by Lord *Henley*, where the devise was, as in the present case, to the testator's eldest son, and, in case he should die without issue before twenty-one, over, Lord *Northington* held that the eldest son took by purchase. It is true that the Court arrived at a different conclusion in *Doe dem. Pratt v. Timins*; but *Scott v. Scott* was not expressly over-ruled by that case, and the soundness of the decision in *Doe dem. Pratt v. Timins* has been questioned by eminent conveyancers.

Mr. *Pemberton* in reply.

The case of *Scott v. Scott* is not inconsistent with the law upon this point, as settled by *Doe dem. Pratt v. Timins*, for a reason which is given in the manuscript notes of Mr. Serjeant *Hill* (b), whose observation upon *Scott v. Scott* is as follows:—"The determination in this case is right, but the reason given for it is wrong." Mr. Serjeant *Hill* then examines the cases in *Croke*, Lord *Raymond*, *Hobart*, &c., and shews that Lord *Northington*

was

(a) *Amb.* 383. 1 *Ed.* 459.

(b) *Amb.* 383. *Blunt's* edit.

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was mistaken in supposing that, where an executory devise over followed a devise in fee to the heir, the heir took by purchase. But the question in *Scott v. Scott* was in reality a mere question as to the right of marshalling the assets, and that depended, not upon the estate which the heir took at law, which for that purpose was wholly immaterial, but upon the intention of the testator. The legatees claimed to have the assets marshalled as against the estate devised to the heir, on the ground that it was descended estate, as the heir took by his preferable title. To decide upon that claim, it was only necessary to inquire whether the will did not shew an equal intention, on the part of the testator, to benefit the heir and the legatees. If the will shewed that the heir and the legatees were equally objects of the testator's bounty, the legatees could have no right to marshal the assets, and it was wholly immaterial what might be the legal effect of the devise to the heir. To have decided otherwise than as Lord *Northington* decided in *Scott v. Scott* would have been to hold that the heir was placed in a worse situation by the devise, than he would have been had he not been the express object of the testator's favour. But the legal effect of such a devise, as is elaborately demonstrated by Serjeant *Hill*, was mistaken by Lord *Northington*.

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It has always been the established doctrine, that a charge upon an estate devised to the heir does not break the descent; how, then, will a condition operate? The charge partially affects the devise, the condition wholly affects it; and it being determined that a charge, which carries off a part, does not break the descent, neither does a condition, which in a particular event would carry off the whole, break the descent.

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PLAYTERS v. ABBOTT.

ROLLS.

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July 24.

Nov. 6.

THE will of Sir *William John Playters*, so far as it applied to the questions in the cause, was in the following words: — “ First, I nominate, constitute, and appoint *Francis Abbott* and *Gardiner Chapman* executors of this my will; and I give and devise to the said *Francis Abbott* and *Gardiner Chapman*, their heirs and assigns, all my messuages, lands, tenements, and hereditaments, as well freehold as copyhold, or of any other tenure, situate, lying, and being in the parishes of *Yelverton*, *Alphington*, *Framingham*, *Earl Bramerton*, and *Holveston*, in the county of *Norfolk*, or in any other parish or place, or parishes or places adjoining or near thereto; and all other my messuages, lands, tenements, and hereditaments whatsoever and wheresoever, and of what nature or tenure soever, whereof or wherein I or any person or persons in trust for me have or hath any estate of freehold or inheritance, to hold the said premises with the appurtenances unto and to the use of the said *Francis Abbott* and *Gardiner Chapman*, their heirs and assigns for ever, upon the trusts and to and for the intents and purposes, and subject to the powers, provisoes, and declarations hereinafter mentioned, expressed, and contained of and concerning the same; that is to say, upon trust that the said *Francis Abbott* and *Gardiner Chapman*, or the survivor of them, or the heirs, executors, or administrators of such survivor, do and shall, by and out of the rents and profits, or by mortgage, sale, or other disposition of the said messuages, lands, tenements, and hereditaments, or any part or parcel thereof, raise and levy all such sum and sums of money as may be necessary for paying, satisfying, and discharging the fines and

Where a testator provides a fund for the payment of fines on admission to copyholds, or on renewals of leases, the manner of raising the fines, and the question of contribution between the tenant for life and the remainder-man, must depend upon the intention of the testator, to be collected from the whole will.

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fees attending the admittance or admittances of the said *Francis Abbott* and *Gardiner Chapman*, or the survivor of them, or the heirs of such survivor, to any part or parts of the said messuages, lands, tenements, and hereditaments, which are or may be holden of any manor or manors by copy of Court Roll; and also the costs, charges, and expenses of maintaining and keeping the houses, edifices, and buildings of and belonging to the said premises in good repair, and also the land-tax, quit-rents, and other outgoings which shall or may become payable for or in respect of the said premises, or any part or parcel thereof; and also the costs, charges, and expenses of executing and performing the trusts of this my will, and subject thereto, upon trust that the said *Francis Abbott* and *Gardiner Chapman*, or the survivor of them, or the heirs of such survivor, do and shall, by and out of the rents and profits of the said messuages, lands, tenements, and hereditaments, pay or cause to be paid to my wife, Dame *Ann Playters*, if she shall survive me, or her assigns, for and during the term of her natural life, one annuity or clear yearly sum of 250*l.* of lawful money of *Great Britain*, free from all taxes, deductions, or other impositions whatsoever, the said annuity or clear yearly sum of 250*l.* to be in lieu and bar of dower, and to be paid to the said Dame *Ann Playters* or her assigns on the four following days: viz. the 6th day of *January*, the 6th day of *April*, the 6th day of *July*, and the 11th day of *October* in each and every year by equal portions, and the first payment thereof to commence and to be made on such of the said days as shall first happen after my decease; and subject thereto, upon trust that the said *Francis Abbott* and *Gardiner Chapman*, or the survivor of them, or the heirs of such survivor, do and shall pay or cause to be paid the clear rents and profits of the said messuages, lands, tenements, and hereditaments into the proper hands of my daughter *Elizabeth Wright*

Wright Moore, the wife of *Robert Moore Esq.*, to and for her sole, separate, and exclusive use and benefit, for and during the term of her natural life, or to such person or persons as she the said *Elizabeth Wright Moore*, notwithstanding her coverture, shall by any writing under her hand from time to time during her life direct or appoint, every such direction and appointment being made from time to time, as to so much only of the rents and profits of the said premises as shall be actually due and payable, and no such direction or appointment to be of any avail or force if made by anticipation, or as to any rents and profits not actually due or payable at the time when such direction or appointment shall be made; and after the decease of the said *Elizabeth Wright Moore*, upon trust that the said *Francis Abbott* and *Gardiner Chapman*, or the survivor of them, or the heirs of such survivor, do and shall, subject and without prejudice to the payment of the said clear yearly sum of 250*l.* to the said *Dame Ann Playters* or her assigns, for and during the term of her natural life as aforesaid, convey and assure the said messuages, lands, tenements, and hereditaments unto and amongst all the children of the body of the said *Elizabeth Wright Moore* lawfully to be begotten, in equal shares as tenants in common, and not as joint tenants, and the several and respective heirs of the bodies of all such children lawfully issuing; and if there shall be but one such child, to the use of such only child, and the heirs of his or her body; and if there shall be more than one such child, and there shall be a failure of lawful issue of the body or bodies of any such child or children, then as to the original part and share, parts and shares of such child or children whose issue shall so fail, as well as to such other part and share, parts and shares, as by virtue of this clause shall have become vested in, or have accrued unto any of the same child and children, and his, her, and their

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issue, upon failure of issue of any other of the said children, upon trust that the said *Francis Abbott* and *Gardiner Chapman*, or the survivor of them, or the heirs of such survivor, do and shall convey and assure the said messuages, lands, tenements, and hereditaments to the use of the remaining and other and others of the said child and children, equally to be divided between and amongst such remaining and other children, if more than one, share and share alike as tenants in common, and not as joint tenants, and the heirs of the body and respective bodies of such remaining and other child and children; and if there shall be but one such remaining or other child, then to the use of such child and the heirs of his or her body; and in default of such issue, then upon trust that the said *Francis Abbott* and *Gardiner Chapman*, or the survivor of them, or the heirs of such survivor, do and shall, out of such rents and profits of the said messuages, lands, tenements, and hereditaments, pay to the said *Robert Moore* any annual sum not exceeding the clear yearly sum of 200*l.*, for and during the term of his natural life, if the said *Elizabeth Wright Moore* shall, by her last will and testament in writing, or any codicil to be by her duly executed, but not otherwise, so direct or appoint, and which annual sum I hereby direct shall be from time to time paid into the proper hands of the said *Robert Moore*, and not to any other person or persons whomssoever, and for which his receipt and receipts, signed with his own proper hand, shall from time to time be the only legal and sufficient discharge and discharges for so much of the said annual sum as shall then be due, and not by way of anticipation, nor so as to enable him to sell, charge, or incumber the same or any part thereof, and subject to such direction or appointment (if any) to or in favour of the said *Robert Moore*, then upon trust, that the said *Francis Abbott* and *Gardiner Chapman*,

man, or the survivor of them, or the heirs of such survivor, do and shall pay or cause to be paid the clear rents and profits of the whole of the said messuages, lands, tenements, and hereditaments to the said Dame *Ann Playters*, in lieu of the said annuity or yearly sum of 250*l.*, or to such person or persons, and for such intents and purposes, as the said Dame *Ann Playters* shall, by any writing or writings under her hand, from time to time direct or appoint, for and during the term of her natural life ; and after her decease and failure of all the limitations aforesaid, then upon trust that the said *Francis Abbott* and *Gardiner Chapman*, or the survivor of them, or the heirs of such survivor, do and shall, subject to such appointment, if any, to or in favour of the said *Robert Moore*, pay or cause to be paid the clear rents and profits of all the said messuages, lands, tenements, and hereditaments to my cousin *W. Hird*, a lieutenant in his Majesty's royal navy, for and during the term of his natural life, to and for his own use and benefit ; and from and after the decease of the said *W. Hird*, then upon trust that the said *Francis Abbott* and *Gardiner Chapman*, or the survivor of them, or the heirs of such survivor, do and shall, subject to such appointment (if any) to or in favour of the said *Robert Moore*, pay or cause to be paid the clear rents and profits of all the said messuages, lands, tenements, and hereditaments to the Rev. *Joshua Hird*, brother of the said *W. Hird*, for and during the term of his natural life, for his own proper use and benefit ; and from and after the respective deceases of the said *W. Hird* and *Joshua Hird*, upon trust, subject to such appointment (if any) to or in favour of the said *Robert Moore*, that the said *Francis Abbott* and *Gardiner Chapman*, or the survivor of them, or the heirs of such survivor, do and shall convey and assure the said messuages, lands, tenements, and hereditaments, unto and amongst all the children

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of the body of the said *Joshua Hird* who shall be living at the time of the death of the survivor of them, the said *W. Hird*, *Joshua Hird*, and *Elizabeth Wright Moore*, and failure of her issue as aforesaid, in equal shares and proportions as tenants in common, and not as joint tenants, and to their respective heirs and assigns for ever; and if there shall be but one such child, in trust to convey and assure the said messuages, lands, tenements, and hereditaments to such only child, his or her heirs and assigns for ever; and if there shall be no such child of the body of the said *Joshua Hird* living at the time of the death of the survivor of them the said *W. Hird*, *Joshua Hird*, *Elizabeth Wright Moore*, and failure of her issue as aforesaid, then I give and devise one moiety of the said messuages, lands, tenements, and hereditaments to the said *Gardiner Chapman*, his heirs and assigns for ever; and I give and devise the other moiety of the said messuages, lands, tenements, and hereditaments to the said *Francis Abbott*, his heirs and assigns for ever; and if the said *Francis Abbott* shall die in my lifetime, then I give and devise such last mentioned moiety of the said messuages, lands, tenements, and hereditaments to *Esther Sarah Abbott* and *Elizabeth Abbott*, of *Brunswick Square*, in the county of *Middlesex*, spinsters, daughters of the said *Francis Abbott*, in equal shares and proportions as tenants in common, and not as joint tenants, and to their heirs and assigns for ever; and if either of them the said *Esther Sarah Abbott* and *Elizabeth Abbott* shall die without issue in my lifetime, and before the decease of the said *Elizabeth Wright Moore*, then I give and devise the whole of such last-mentioned moiety of the said messuages, lands, tenements, and hereditaments to the survivor of them the said *Esther Sarah Abbott* and *Elizabeth Abbott*, her heirs and assigns for ever."

The

The bill was filed by Dame *Ann Playters*, the widow of the testator, and *Robert Moore* and *Elizabeth Wright Moore* his wife, the daughter of the testator, against the trustees *Abbott* and *Chapman*, and all other persons interested in the testator's estate under the will, praying the establishment of the will, and the directions of the Court as to the execution of the trusts. It appeared, by the answer of the trustees, that the rents of the freehold and copyhold estates of the testator amounted together to about 800*l.* a year, and that the fines to be paid immediately on the admission of the trustees to the copyhold estates amounted to 1400*l.*, besides the expenses.

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Mr. Bickersteth, for the Plaintiffs.

Two questions are raised by this will: first, as to the fund out of which the fines due on the admission of the trustees to the copyhold part of the property are to be paid; and, secondly, whether any and what contribution is to be made by the tenant for life towards the payment of such fines and expenses.

It has been decided that, where a testator directs a renewal of leaseholds out of the rents and profits of his estates, such a direction is equivalent to a power to raise the gross sum necessary for the payment of the fines upon renewal by sale or mortgage; the ground of this decision being that, as the sum to be raised must be paid immediately, whenever the occasion for renewal arises, it cannot be intended that it should be raised out of the annual rents and profits: *Allan v. Backhouse*. (a) In this case the testator directs that the sums which may from time to time be necessary to pay the fines upon admission to his copyhold estates be raised *out of the rents and profits, or*
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(a) 2 V. & B. 65.

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by mortgage, sale, or other disposition of the whole estates devised by his will. If the words *out of the rents and profits*, without more, give a power to the trustees to raise *by mortgage or sale*, the addition of the words to which they are equivalent cannot alter the force of the prior expressions. But, if the raising *out of rents and profits* is to be considered as contradistinguished from the raising *by mortgage or sale*, so that "rents and profits" must necessarily be taken to mean annual rents and profits, then, *reddendo singula singulis*, these annual rents and profits will be properly applicable to the payment of the further charges which the testator goes on to specify, namely, repairs, land-tax, quit-rent, and other annual outgoings, while the gross sums immediately required for the payment of fines upon admissions will be properly raisable by mortgage or sale of the testator's estates.

Where a fund can be raised by mortgage, a court of equity will not permit the interests of the reversioner to be defeated by a sale. Assuming, therefore, that the fund, out of which the fines are from time to time to be paid, is to be raised by mortgage, the next question is, whether this charge is to be borne by the tenant for life, or by the persons entitled in remainder; and if by both, in what manner the charge is to be apportioned; a subject which has been frequently discussed in this Court, but which is still in an unsettled and unsatisfactory state. The rule adopted in the old cases was, that the tenant for life should pay one third, and that the remaining two thirds should be paid by the person entitled in remainder: *Ballet v. Spranger* (a), *Cornish v. Mew*. (b) This rule was manifestly arbitrary, and unequal in its operation, inasmuch as a tenant for life of advanced years would pay more than his fair proportion,

(a) *Pr. Ch.* 62.(b) 1 *Ch. Ca.* 271.

proportion, while a younger life would probably reap the whole benefit of the renewed term to the great prejudice of the remainder-man. The rule was, for this reason, disapproved of by Lord *Hardwicke* in *Verney v. Verney* (a); and Lord *Thurlow*, in *Nightingale v. Lawson* (b), introduced a sounder principle; namely, that the burthen should be borne by the parties in proportion to the benefit which they enjoyed. In *Stone v. Theed* (c), the old rule is considered as exploded; and the general principle, that the proportion should follow the enjoyment, is again laid down by Lord *Thurlow*. In *Buckeridge v. Ingram* (d), it is said by Lord *Alvanley* "the rule is clear that, wherever a lease that requires renewal is entailed, and a partial interest is given to any one, that person is not to bear the whole, but will only have to keep down the interest of the money advanced." In *White v. White* (e), this subject underwent much discussion: in that case the tenant for life was also entitled to the reversion after an estate tail; but Lord *Alvanley*, notwithstanding that circumstance, adhered to the rule that the tenant in possession was only to keep down the interest of the sum raised for renewal. At the rehearing of this cause Lord *Eldon* (g) did not accede to this rule without modification; but he considered it applicable to cases where the remainder-man takes the estate subject to a mortgage or charge upon the *corpus* of the estate: and the present case may be considered, as well upon the authority of *Allan v. Backhouse* (h) as upon the language of the particular instrument, to be a case of that description. In *Milles v. Milles* (i), the fines were decreed to be raised out of the rents and profits, but there

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(a) 1 *Ves. sen.* 428.

(b) 1 *Bro. C. C.* 441.

(c) 2 *Bro. C. C.* 244.

(d) 2 *Ves. jun.* 666.

(e) 4 *Ves.* 24.

(g) 5 *Ves.* 554. and 9 *Ves.* 560.

(h) 2 *V. & B.* 65.

(i) 6 *Ves.* 761.

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there the circumstances were extremely special, the renewals being made annually; and the tenant for life had the means of recouping himself, as he was declared entitled to the fines payable upon the granting of underleases. In *Randall v. Russell* (a), it was held that the persons entitled in remainder under the trusts of a will should contribute to the fine paid by the tenant for life on the renewal of a college lease, in such proportions as should be settled by the Master. In *Allan v. Backhouse*, which was confirmed on appeal (b) by Lord Eldon, Sir Thomas Plumer directed a reference to the Master to inquire what proportion of the capital, as well as the interest, should be paid by the tenant for life with reference to the benefit derived by him. In *Milsintown v. Lord Portmore* (c), it was held that a discretionary power of renewal given to trustees was a power which they could exercise only for the benefit of the *cestui que trusts*, and that they could not throw the burthen of the fines paid for renewal upon the *corpus* of the estate, to the prejudice of the remainder-man. Such is the state of the authorities on this subject; and the current of these authorities seems undoubtedly in favour of the principle that the tenant for life ought not to pay more than the interest of the sum to be raised for payment of the fines. If, however, the Court should be of opinion that the tenant for life is to bear a proportion of the capital sum to be raised for the payment of the fines upon admission, the question arises, how that proportion is to be settled between the tenant for life and the remainder-man? The principle is admitted, that the proportion in which the tenant for life should contribute is according to his enjoyment; and the fair amount of his contribution upon that principle is capable of being reduced

(a) 5 Mer. 190.

(b) Jac. 651.

(c) 3 Mad. 491., and 5 Mad.

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reduced to a certainty by insuring the lives of the trustees who are admitted from time to time, so that, upon the death of the trustees, a fund might always be ready to answer the payment of the fines, the person in actual possession paying the annual premiums upon the policy. It is clear, in this case, that the charge cannot be raised out of the annual rents and profits, for the lord will not wait for his fine; and there are provisions in the will, such as the direction to pay to the widow a *clear* annuity of 250*l.* out of the rents and profits, and after her death to pay the *clear* rents and profits to the daughter for her life, which are wholly inconsistent with an intention on the part of the testator that the fines should be satisfied otherwise than by a charge on the *corpus* of the estate.

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Mr. Tinney, *contra*.

The trust is here not merely to pay and satisfy the fines upon admission to the copyholds, but to keep the premises in repair, and to pay the land-tax, quit-rents, and other annual outgoings; and, though the testator gives the trustees a discretion to satisfy these charges, either out of the rents and profits, or by mortgage or sale, the inference is, as he has classed the fines upon admission to the copyholds with charges in their nature payable out of the annual rents and profits, that he meant the whole to be borne by the tenant in possession. In *Stone v. Theed*, where the testator directed his trustees to pay the fines of renewals, and gave his freehold, leasehold, and personal property, charged with annuities, in trust to pay the rents and profits to his sister for her life, Lord *Thurlow* held that the intent of keeping up the estate must be understood to be paramount to the intent of making a provision for the first taker, and he accordingly decided that the
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produce of the whole must be first applied to the purpose of the renewals. In *White v. White*, the testator expressly limited the charge upon his estate for renewals to the sum of 500*l.*, and as the remainder-man called for the renewal, it was held that he was not entitled to contribution from the tenant for life. In *Montford v. Cadogan (a)*, the trustees, who had neglected to renew, were held to be liable as for a breach of trust, but the assets of the tenants for life were declared to be in the first place applicable to the payment of the fines in proportion to the period of their enjoyment. *Milsintown v. Lord Portmore* is a direct authority against throwing the charge upon the *corpus* of the estate, and is, indeed, a stronger case against the tenant for life than the present, inasmuch as a larger discretion was given to the trustees; but it was held that such discretion did not give the trustees an arbitrary power to preserve or destroy the estate, and that it could not be exercised to the prejudice of the remainder-man. As to the direction to pay the annuity to the widow, and after her decease to pay the clear rents and profits to the daughter for her life, this direction is subject to the previous trust for satisfying the fines upon admission.

Mr. *Bickersteth* in reply.

Nov. 6.

The MASTER of the ROLLS.

Where a testator indicates an intention that fines on the admission to copyholds, and on the renewal of leases, should from time to time be paid, in order to maintain a permanent interest in the property for the benefit of those to whom he has successively limited his

(a) 17 *Ves.* 485. 2 *Mer.* 3. and 19 *Ves.* 655.

his fee-simple estates, and has not described the fund out of which such payment should be made, the general principles of equity require, and the course of authority has settled, that the tenant for life and those in remainder shall bear the burthen of those payments in the proportion of the benefits which they actually derive from such admissions or renewals. Where a testator, having the same purpose, expressly provides a fund for such payments, the question no longer depends upon general principles of equity, but, as to the manner of raising the fines and the contribution of the tenant for life, is to be determined by the intention of the testator in both respects, as it is to be collected from the whole will.

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In this case the devise is of freehold as well as copyhold property; and the direction of the testator is, that the fines shall be raised and levied by and out of the rents and profits, or by sale or mortgage, or other disposition of the freehold and copyhold property, or any part of it. The rents of the freehold and copyhold property amount together to about 800*l.* a year, and the fines on the copyholds, immediately to be paid in order that the trustees might be presently in possession of the rents and profits to be derived from them, amounted to 1400*l.* besides the expenses. No rents and profits could accrue before these fines were demandable; and it is, therefore, reasonably to be inferred, that the testator intended to give authority to the trustees to raise and levy the sum by sale or mortgage. It is also to be observed that the testator, out of the annual rents and profits, gives an annuity to his widow in lieu of dower, which, becoming due from his death, could not possibly wait for satisfaction until the fines were provided for out of the annual rents and profits. It is true that the testator in the same passage refers to repairs and land-tax, and other outgoings, which are in
 their

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their nature annual payments to be made out of annual rents and profits; but it is to be considered that the testator's true meaning was that the trustees should use the power of sale or mortgage where the purpose could not be answered by annual rents and profits, and should, out of annual rents and profits, discharge annual payments.

The next question to be considered is, whether the testator in his will has intimated an intention that the tenant for life should in any manner contribute to the expenses of the fines, beyond keeping down the annual interest of the mortgage. Suppose the trustees had exercised their clear authority to sell a part of the freehold for the purpose of raising the amount of the fines, is there in this will any indication of an intention on the part of the testator that the trustees should retain from the tenant for life future annual rents, in order to repurchase freehold equal in value to that which was sold, or any part of it?

The testator, after giving the annuity to his widow in lieu of dower, and subject to the annual interest or deduction which might be imposed by sale or mortgage, directs the trustees to pay the *clear* annual rents and profits of the devised premises to his daughter and only child, for her sole, separate, and exclusive use and benefit. This direction is wholly inconsistent with any intention on the part of the testator that a part of the annual rents and profits should be reserved from the daughter's use, in order to contribute towards the principal of the mortgage.

Upon the whole, therefore, my opinion is, that it was the intention of the testator that the fines and fees should be raised by sale or mortgage, and that the daughter should bear no other burthen in respect of such fines than the interest of the mortgage.

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July 27.
Aug. 5.
Nov. 6. 18. 25.

THE late Duke of *Marlborough* devised certain freehold and copyhold estates to the use of trustees and their heirs, in trust for his son, then Marquis of *Blandford*, for his life, with remainder to his grandson, the eldest son of the said Marquis of *Blandford* for his life, with remainder to the first and other sons of his said grandson in strict settlement, with divers remainders over.

Where the first trust of leasehold property held for lives and years is to pay the fines on renewals out of the rents and profits, and the next trust is for the benefit of those who in strict settlement take freehold and copyhold property under the same will, the expenses of renewal are incidental to the leasehold property, and fall upon those who from time to time are entitled to the possession of it under the will.

These freehold and copyhold estates were subjected by the testator to a term of 300 years, limited to the same trustees, and the survivors of them, &c., upon trust for the payment of his debts, and upon other trusts mentioned in the will; and a power to sell for those purposes and to invest the surplus was given to the trustees of the term in the following words:—
“Provided always, and I do hereby declare that it shall be lawful for the said Lord *Charles Spencer*, Lord *Robert Spencer*, *William Lord Auckland*, and *James Blackstone*, and the survivors and survivor of them, and the executors and administrators of such survivor, at any time or times within twenty years after my decease, at their and his free and uncontrolled discretion, to make sale and absolutely dispose of any part or parts of the said manors, messuages, lands, tenements, and other hereditaments hereinbefore devised to the said *George Marquis of Blandford* for his life in possession as aforesaid, unto any person or persons whomsoever, either by public auction or private contract, for such price or prices and in such manner as to the trustees or trustee
for

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for the time being, concerning this present power, shall seem reasonable and proper. And it is my will, that for the purpose of carrying into effect any such sale or sales as aforesaid, it shall be lawful for the said Lord *Charles Spencer*, Lord *Robert Spencer*, *William Lord Auckland*, and *James Blackstone*, and the survivors and survivor of them, and the executors or administrators of such survivor, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by the trustees or trustee for the time being, concerning this present power, in the presence of, and to be attested by, two or more credible witnesses, absolutely to determine, revoke, and make void all and every or any of the uses, estates, trusts, powers, and provisions hereinbefore limited, declared, and expressed of and concerning the hereditaments so to be sold; and by the same or any other deed or deeds, instrument or instruments in writing, to be sealed and delivered and so attested as aforesaid, to limit, declare, direct, or appoint any use or uses, estate or estates, trust or trusts of or concerning the hereditaments, the uses of which shall be so revoked, which it shall be thought requisite or expedient to limit, declare, direct, or appoint, in order to effectuate any such sale or sales as aforesaid. And I do hereby direct that the trustees or trustee for the time being, concerning this present power, shall stand possessed of the money to be produced by any such sale or sales as aforesaid, upon the trusts following: (that is to say,) if my personal estate, exclusive of my leasehold estates for years, and such shares in the *Oxford Canal*, as I shall or may happen to die possessed of, and exclusive of such other part or parts of my personal estate as is or are specifically bequeathed, shall not be sufficient for the payment of my just debts, funeral and testamentary expenses, and the legacies which shall or may be given by this my will, or by any codicil or codicils, or by any other
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testamentary writing or writings whatsoever, then in trust that they the said Lord *Charles Spencer*, Lord *Robert Spencer*, *William Lord Auckland*, and *James Blackstone*, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall lay out and apply the money so to be raised as aforesaid, or so much thereof as to my said trustees or trustee for the time being shall seem requisite in aid of my said personal estate, towards satisfaction and discharge of such debts, funeral and testamentary expenses, and legacies as aforesaid, and do and shall lay out the surplus (if any) of the money so to be raised as aforesaid; and if my said personal estate (exclusively as aforesaid) shall be adequate for the purposes hereinbefore mentioned, then the whole of such money in the purchase of other manors, lands, or hereditaments, to be situate in *England*, and to be of a clear indefeasible estate of inheritance in fee simple in possession, or of any lands or tenements of a copyhold or leasehold tenure convenient to be held therewith; and do and shall, with all convenient speed, settle and assure, or cause to be settled and assured the hereditaments so to be purchased as aforesaid, to such of the uses, upon and for such of the intents and purposes, and with, under, and subject to such of the powers, provisoes, and declarations hereinbefore limited, declared, and expressed of and concerning the hereditaments which shall be sold in pursuance of this present power, as shall be then capable of taking effect, or as near thereto as the nature of the hereditaments to be purchased will admit of; yet so nevertheless, that if any of the lands so to be purchased shall be held by lease or leases for years, the same shall not vest absolutely in any person or persons entitled by virtue of the limitations hereinbefore contained to any estate tail therein, if such person or persons shall die under the age of twenty-one

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years without leaving issue male of his, her, or their body or respective bodies, but yet such person or persons shall, during his, her, or their life or respective lives, be entitled to the rents, issues, and profits of such lands so held by lease or leases for years as aforesaid. And my will is, that if any of the lands so to be purchased shall be held by lease or leases for lives or for years, proper provisions shall be inserted in the settlement to be made thereof as aforesaid, for renewing and keeping on foot such lease or leases from time to time as occasion shall require. And I do hereby direct that the fines, fees, and other expenses attending any such renewals or renewal as aforesaid, shall from time to time be defrayed out of the rents, issues, and profits of the lands to be comprised in such renewed lease or leases respectively."

The testator, being entitled to many leasehold estates of considerable annual value, held partly for lives and partly for terms of years, proceeded by his will to devise and bequeath the same leaseholds in the following words:—"And I give and bequeath all my messuages, lands, tenements, and hereditaments which are held by me under any leases for lives or for any term or terms of years either absolutely or determinable upon the death of any person or persons, with the appurtenances, and which are not hereinbefore devised, and all my estate and interest therein, subject to the rents, covenants, and agreements reserved and contained in the several leases under which the said premises are holden, to the said Lord *Charles Spencer*, Lord *Robert Spencer*, *William Lord Auckland*, and *James Blackstone*, trustees, their heirs, executors, administrators, and assigns, in trust from time to time to renew and keep on foot the leases of the same leasehold premises, and out of the rents, issues, and profits of the same premises to pay the

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(a) 2 V. & B. 65.

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Where a fund can be raised by mortgage, a court of equity will not permit the interests of the reversioner to be defeated by a sale. Assuming, therefore, that the fund, out of which the fines are from time to time to be paid, is to be raised by mortgage, the next question is, whether this charge is to be borne by the tenant for life, or by the persons entitled in remainder; and if by both, in what manner the charge is to be apportioned; a subject which has been frequently discussed in this Court, but which is still in an unsettled and unsatisfactory state. The rule adopted in the old cases was, that the tenant for life should pay one third, and that the remaining two thirds should be paid by the person entitled in remainder: *Ballet v. Spranger* (a), *Cornish v. Mew*. (b) This rule was manifestly arbitrary, and unequal in its operation, inasmuch as a tenant for life of advanced years would pay more than his fair proportion,

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(a) 1 *Ves.* sen. 428.

(b) 1 *Bro. C. C.* 441.

(c) 2 *Bro. C. C.* 244.

(d) 2 *Ves.* jun. 666.

(e) 4 *Ves.* 24.

(f) 5 *Ves.* 554. and 9 *Ves.* 560.

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Mr. *Tinney*, *contra*.

The trust is here not merely to pay and satisfy the fines upon admission to the copyholds, but to keep the premises in repair, and to pay the land-tax, quit-rents, and other annual outgoings; and, though the testator gives the trustees a discretion to satisfy these charges, either out of the rents and profits, or by mortgage or sale, the inference is, as he has classed the fines upon admission to the copyholds with charges in their nature payable out of the annual rents and profits, that he meant the whole to be borne by the tenant in possession. In *Stone v. Theed*, where the testator directed his trustees to pay the fines of renewals, and gave his freehold, leasehold, and personal property, charged with annuities, in trust to pay the rents and profits to his sister for her life, Lord *Thurlow* held that the intent of keeping up the estate must be understood to be paramount to the intent of making a provision for the first taker, and he accordingly decided that the
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produce of the whole must be first applied to the purpose of the renewals. In *White v. White*, the testator expressly limited the charge upon his estate for renewal to the sum of 500*l.*, and as the remainder-man called for the renewal, it was held that he was not entitled to contribution from the tenant for life. In *Montford v. Cadogan (a)*, the trustees, who had neglected to renew, were held to be liable as for a breach of trust, but the assets of the tenants for life were declared to be in the first place applicable to the payment of the fines in proportion to the period of their enjoyment. *Milsintown v. Lord Portmore* is a direct authority against throwing the charge upon the *corpus* of the estate, and is, indeed, a stronger case against the tenant for life than the present, inasmuch as a larger discretion was given to the trustees; but it was held that such discretion did not give the trustees an arbitrary power to preserve or destroy the estate, and that it could not be exercised to the prejudice of the remainder-man. As to the direction to pay the annuity to the widow, and after her decease to pay the clear rents and profits to the daughter for her life, this direction is subject to the previous trust for satisfying the fines upon admission.

Mr. *Bickersteth* in reply.

Nov. 6.

The MASTER of the ROLLS.

Where a testator indicates an intention that fines on the admission to copyholds, and on the renewal of leases, should from time to time be paid, in order to maintain a permanent interest in the property for the benefit of those to whom he has successively limited

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(a) 17 *Ves.* 485. 2 *Mer.* 3. and 19 *Ves.* 655.

his fee-simple estates, and has not described the fund out of which such payment should be made, the general principles of equity require, and the course of authority has settled, that the tenant for life and those in remainder shall bear the burthen of those payments in the proportion of the benefits which they actually derive from such admissions or renewals. Where a testator, having the same purpose, expressly provides a fund for such payments, the question no longer depends upon general principles of equity, but, as to the manner of raising the fines and the contribution of the tenant for life, is to be determined by the intention of the testator in both respects, as it is to be collected from the whole will.

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In this case the devise is of freehold as well as copyhold property; and the direction of the testator is, that the fines shall be raised and levied by and out of the rents and profits, or by sale or mortgage, or other disposition of the freehold and copyhold property, or any part of it. The rents of the freehold and copyhold property amount together to about 800*l.* a year, and the fines on the copyholds, immediately to be paid in order that the trustees might be presently in possession of the rents and profits to be derived from them, amounted to 1400*l.* besides the expenses. No rents and profits could accrue before these fines were demandable; and it is, therefore, reasonably to be inferred, that the testator intended to give authority to the trustees to raise and levy the sum by sale or mortgage. It is also to be observed that the testator, out of the annual rents and profits, gives an annuity to his widow in lieu of dower, which, becoming due from his death, could not possibly wait for satisfaction until the fines were provided for out of the annual rents and profits. It is true that the testator in the same passage refers to repairs and land-tax, and other outgoings, which are in
their

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their nature annual payments to be made out of annual rents and profits; but it is to be considered that the testator's true meaning was that the trustees should use the power of sale or mortgage where the purpose could not be answered by annual rents and profits, and should, out of annual rents and profits, discharge annual payments.

The next question to be considered is, whether the testator in his will has intimated an intention that the tenant for life should in any manner contribute to the expenses of the fines, beyond keeping down the annual interest of the mortgage. Suppose the trustees had exercised their clear authority to sell a part of the freehold for the purpose of raising the amount of the fines, is there in this will any indication of an intention on the part of the testator that the trustees should retain from the tenant for life future annual rents, in order to repurchase freehold equal in value to that which was sold, or any part of it?

The testator, after giving the annuity to his widow in lieu of dower, and subject to the annual interest or deduction which might be imposed by sale or mortgage, directs the trustees to pay the *clear* annual rents and profits of the devised premises to his daughter and only child, for her sole, separate, and exclusive use and benefit. This direction is wholly inconsistent with any intention on the part of the testator that a part of the annual rents and profits should be reserved from the daughter's use, in order to contribute towards the principal of the mortgage.

Upon the whole, therefore, my opinion is, that it was the intention of the testator that the fines and fees should be raised by sale or mortgage, and that the daughter should bear no other burthen in respect of such fines than the interest of the mortgage.

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THE late Duke of *Marlborough* devised certain freehold and copyhold estates to the use of trustees and their heirs, in trust for his son, then Marquis of *Blandford*, for his life, with remainder to his grandson, the eldest son of the said Marquis of *Blandford* for his life, with remainder to the first and other sons of his said grandson in strict settlement, with divers remainders over.

Where the first trust of leasehold property held for lives and years is to pay the fines on renewals out of the rents and profits, and the next trust is for the benefit of those who in strict settlement take freehold and copyhold property under the same will, the expenses of renewal are incidental to the leasehold property, and fall upon those who from time to time are entitled to the possession of it under the will.

These freehold and copyhold estates were subjected by the testator to a term of 300 years, limited to the same trustees, and the survivors of them, &c., upon trust for the payment of his debts, and upon other trusts mentioned in the will; and a power to sell for those purposes and to invest the surplus was given to the trustees of the term in the following words:—
“Provided always, and I do hereby declare that it shall be lawful for the said Lord *Charles Spencer*, Lord *Robert Spencer*, *William Lord Auckland*, and *James Blackstone*, and the survivors and survivor of them, and the executors and administrators of such survivor, at any time or times within twenty years after my decease, at their and his free and uncontrolled discretion, to make sale and absolutely dispose of any part or parts of the said manors, messuages, lands, tenements, and other hereditaments hereinbefore devised to the said *George Marquis of Blandford* for his life in possession as aforesaid, unto any person or persons whomsoever, either by public auction or private contract, for such price or prices and in such manner as to the trustees or trustee for

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for the time being, concerning this present power, shall seem reasonable and proper. And it is my will, that for the purpose of carrying into effect any such sale or sales as aforesaid, it shall be lawful for the said Lord *Charles Spencer*, Lord *Robert Spencer*, *William Lord Auckland*, and *James Blackstone*, and the survivors and survivor of them, and the executors or administrators of such survivor, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by the trustees or trustee for the time being, concerning this present power, in the presence of, and to be attested by, two or more credible witnesses, absolutely to determine, revoke, and make void all and every or any of the uses, estates, trusts, powers, and provisos hereinbefore limited, declared, and expressed of and concerning the hereditaments so to be sold; and by the same or any other deed or deeds, instrument or instruments in writing, to be sealed and delivered and so attested as aforesaid, to limit, declare, direct, or appoint any use or uses, estate or estates, trust or trusts of or concerning the hereditaments, the uses of which shall be so revoked, which it shall be thought requisite or expedient to limit, declare, direct, or appoint, in order to effectuate any such sale or sales as aforesaid. And I do hereby direct that the trustees or trustee for the time being, concerning this present power, shall stand possessed of the money to be produced by any such sale or sales as aforesaid, upon the trusts following: (that is to say,) if my personal estate, exclusive of my leasehold estates for years, and such shares in the *Oxford Canal*, as I shall or may happen to die possessed of, and exclusive of such other part or parts of my personal estate as is or are specifically bequeathed, shall not be sufficient for the payment of my just debts, funeral and testamentary expenses, and the legacies which shall or may be given by this my will, or by any codicil or codicils, or by any other tes-

testamentary writing or writings whatsoever, then in trust that they the said Lord *Charles Spencer*, Lord *Robert Spencer*, *William Lord Auckland*, and *James Blackstone*, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall lay out and apply the money so to be raised as aforesaid, or so much thereof as to my said trustees or trustee for the time being shall seem requisite in aid of my said personal estate, towards satisfaction and discharge of such debts, funeral and testamentary expenses, and legacies as aforesaid, and do and shall lay out the surplus (if any) of the money so to be raised as aforesaid; and if my said personal estate (exclusively as aforesaid) shall be adequate for the purposes hereinbefore mentioned, then the whole of such money in the purchase of other manors, lands, or hereditaments, to be situate in *England*, and to be of a clear indefeasible estate of inheritance in fee simple in possession, or of any lands or tenements of a copyhold or leasehold tenure convenient to be held therewith; and do and shall, with all convenient speed, settle and assure, or cause to be settled and assured the hereditaments so to be purchased as aforesaid, to such of the uses, upon and for such of the intents and purposes, and with, under, and subject to such of the powers, provisoes, and declarations hereinbefore limited, declared, and expressed of and concerning the hereditaments which shall be sold in pursuance of this present power, as shall be then capable of taking effect, or as near thereto as the nature of the hereditaments to be purchased will admit of; yet so nevertheless, that if any of the lands so to be purchased shall be held by lease or leases for years, the same shall not vest absolutely in any person or persons entitled by virtue of the limitations hereinbefore contained to any estate tail therein, if such person or persons shall die under the age of twenty-one

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years without leaving issue male of his, her, or their body or respective bodies, but yet such person or persons shall, during his, her, or their life or respective lives, be entitled to the rents, issues, and profits of such lands so held by lease or leases for years as aforesaid. And my will is, that if any of the lands so to be purchased shall be held by lease or leases for lives or for years, proper provisions shall be inserted in the settlement to be made thereof as aforesaid, for renewing and keeping on foot such lease or leases from time to time as occasion shall require. And I do hereby direct that the fines, fees, and other expenses attending any such renewals or renewal as aforesaid, shall from time to time be defrayed out of the rents, issues, and profits of the lands to be comprised in such renewed lease or leases respectively."

The testator, being entitled to many leasehold estates of considerable annual value, held partly for lives and partly for terms of years, proceeded by his will to devise and bequeath the same leaseholds in the following words:—"And I give and bequeath all my messuages, lands, tenements, and hereditaments which are held by me under any leases for lives or for any term or terms of years either absolutely or determinable upon the death of any person or persons, with the appurtenances and which are not hereinbefore devised, and all my estate and interest therein, subject to the rents, covenants and agreements reserved and contained in the several leases under which the said premises are holden, to the said Lord *Charles Spencer*, Lord *Robert Spencer*, *William Lord Auckland*, and *James Blackstone*, trustees, their heirs, executors, administrators, and assigns, in trust from time to time to renew and keep on foot the leases of the same leasehold premises, and out of the rents, issues, and profits of the same premises to pay
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the fines, fees, and other expenses attending such renewal. And I do hereby declare my will to be, that my said trustees or trustee for the time being shall stand and be possessed of all the said leasehold premises, subject to the trust hereinbefore declared thereof, upon such trusts, to and for such intents and purposes, and with, under, and subject to such powers, provisoes, and declarations as will nearest and best correspond with such of the uses, trusts, intents, and purposes, powers, provisoes, and declarations as are hereinbefore by this my will expressed and contained of and concerning the freehold and copyhold estates hereinbefore devised to my said son *George Marquis of Blandford* for his life in possession as aforesaid, so far as the different natures of the property and the rules of law and equity will admit. Provided nevertheless, that the said leasehold premises for years shall not vest absolutely in any person or persons entitled by virtue hereof to an estate tail in possession in the said freehold and copyhold premises, if such person or persons shall die under the age of twenty-one years and without leaving issue male of his her or their body or respective bodies; but nevertheless such person or persons respectively shall, during his or her life or respective lives, be entitled to the rents, issues, and profits of the same leasehold premises."

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The testator himself was one of the lives inserted in two of the most valuable leases, and after the death of the testator, the trustees renewed those leases by adding a new life in the place of the testator, and paid, at certain intervals, for the fines of such renewals two sums amounting together to about 14,000*l*. One other lease only, which was of inconsiderable value, was held for lives, and in this the testator's life was not inserted. About seventeen other leases were held for terms of years. The annual income of all the leaseholds amounted

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to little more than 4000*l*. In the prior proceedings of the cause, a receiver had been appointed of the rents of the leasehold estates, and out of those rents the trustees had paid the fines of all renewals without prejudice to the question on what fund the expenses of fines and renewals should fall.

The questions now before the Court upon the Master's report with respect to such renewals were, first, out of what fund the fines and expenses of the renewals ought to be paid; and, secondly, whether any and what apportionment of the fines and expenses of renewals was to be made between the tenant for life, and the persons entitled in remainder.

Upon the general question as to the apportionment of the payment of fines upon renewals between the tenant for life and the remainder-man, the same course of argument was pursued, and the same authorities were cited in this case as in the preceding case of *Playters v. Abbott*.

Mr. Tinney and Mr. J. Romilly, for the Marquis of Blandford and Lord Sunderland, his eldest son, commented upon the particular provisions of the Duke of Marlborough's will (an instrument comprised in seventy-eight brief sheets), and they relied upon the language of those provisions, and upon the order of the limitations, as manifesting the testator's intention to relieve the *corpus* of his estates from the fines payable on the renewal of his leasehold estates as well for lives as for years, and to throw the burthen of the renewals on those who should be successively entitled to the rents and profits.

The testator had given his leasehold estates, as well for lives as for years, to trustees, upon trust in the first place

place to renew and keep on foot the leases, and out of the rents and profits of such leasehold estates to pay the fines and other expenses incidental to renewal. There was a previous limitation in strict settlement of the testator's freehold and copyhold estates; and out of these freehold and copyhold estates a term of 300 years was created for the payment of the testator's debts, and other trusts mentioned in the will; and a power was given to the trustees of this term, who were the same trustees to whom the leaseholds were limited, to sell such portion of the freehold and copyhold estates as they might think fit, and, after satisfaction of the trusts, to invest the surplus in the purchase of other freehold and copyhold messuages, or of renewable leaseholds, to be settled to the same uses as the devised estates; and if the trustees should think fit to purchase renewable leaseholds, they were directed to keep the leases on foot out of the rents and profits of the leasehold premises so to be purchased with the produce of sale. If the trustees had exercised their power by purchasing renewable leaseholds, could it be contended, upon these limitations, that it was the intention of the testator that the expense of the renewals should be thrown upon the *corpus* of the estate, and no greater burthen imposed upon the tenant for life than that of paying the interest of the fund raised for renewals? The primary intention of the testator was, that the leases of his renewable leasehold property should be kept on foot out of the rents and profits of that property; and when he proceeded to settle his leasehold estates, he settled them upon the same trusts which applied to his freehold and copyhold estates, but subject to the previous trust as to the renewals, which over-rode all beneficial interest in the leasehold property. It was plain, therefore, that he meant to provide for the renewals without any diminution of the *corpus* of his estates, and to throw the burthen of them upon such persons

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as should be successively entitled to the rents and profits of the leasehold estates.

Mr. *Wray*, for General *St. John*, the assignee of the Duke of *Marlborough*, said, that the effect of the construction contended for on the part of the tenants in remainder, would be to throw the whole charge of the fines and expenses payable upon renewals on the annual rents and profits of the leasehold property. Now those annual rents and profits did not amount to more than one third of the sum payable for fines immediately on the death of the late duke. It could never have been the intention of the testator, therefore, to throw the whole burthen of those fines upon the tenant for life.

Mr. *Pemberton*, for the trustees.

Mr. *C. Romilly*, for the Duke of *Marlborough*.

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Where the testator has expressed a general intention that his leasehold property should be renewed and held in succession by those entitled to freehold property which he has devised in strict settlement, but has not expressed the manner in which the fines and expenses of renewals are to be provided for, it is now settled upon equitable principles that such expense of renewals must be borne by the tenant for life, and those in remainder, in the proportion of the benefit which they respectively derive from such renewals. The old rule was, that the tenant for life should in such cases contribute one third, and that two thirds should be borne by those in remainder. This rule appears to have been first departed from

from by Lord *Thurlow* in the case of *Nightingale v. Lawson* (a), and upon plain reason. Where the tenant for life was of an age which, considering the probable duration of life, made the value of his life equal to one third of the property, this rule might with some reason be applied; but where he happened to be of a much more advanced age, as for instance eighty years old, it could not be just and equal that he should bear the same proportion of the expense of renewal as if he were only of the age of thirty. In departing from this rule, it might at first sight seem to have been proper that the proportion of the expense of renewal which should fall upon the tenant for life should be estimated according to his actual age, and the probable duration of his life; but accident might render this new rule unequal and unjust to the tenant for life, or to the remainderman, as the tenant for life happened to survive a longer or a shorter period than that which might be expected according to the probable duration of his life. The principle adopted by Lord *Thurlow* is altogether equitable, that the proportion to be borne by the tenant for life should depend upon the actual benefit which he derived from the renewal; and this is now to be considered as the settled rule of the Court.

The case now before the Court does not, however, depend upon the general principles of equity, because here the testator has directed the mode in which the expense of the renewals is to be provided for, namely, out of the rents and profits of the leasehold premises generally; and the question is, what was the intention of the testator by this direction, and this intention is to be collected not from the particular expressions only, but from the whole contents of the will.

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(a) 1 Bro. C. C. 441.

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The case of *Stone v. Theed* (a) has some bearing upon the present question: there the testator devised and bequeathed freehold, leasehold, and other personal property to trustees, upon trust, after paying certain annuities, to pay the residue of the rents and profits to one for life, with remainders over, and he directed his trustees from time to time to renew the lease and add new lives if they could obtain such lease; and in that case Lord *Thurlow* inferred it to be the intention of the testator that the expense of renewal should be paid out of the income of the whole property, and that the tenant for life was not bound to make any contribution towards the expense of such renewal.

In *Allan v. Backhouse* (b) the testatrix devised leaseholds for lives, and all other her real estates, to trustees and their heirs, upon trust for *A.* for life, with remainders over in strict settlement to the first and other sons of the tenant for life; and she directed that her leaseholds for lives should from time to time be renewed as occasion should require by and out of the rents and profits of the leasehold property, or the rents and profits of her other estates thereby devised. The testatrix died in 1785, and in 1804 one of the lives dropped on which the leaseholds were held, and the question in the cause was how the expense of adding a new life was to be provided for. The decree made by Sir *Thomas Plumer* directed that the expenses of the renewal should be raised by sale or mortgage of the whole devised property, and he referred it to the Master to inquire what proportion of the mortgage, as well as the interest, with reference to the benefit derived by the tenant for life, should be borne by him. This decree appears to have been confirmed by Lord

Eldon,

(a) 2 Bro. C. C. 244.

(b) 2 Ves. & B. 65.

Eldon, but there is no report of the arguments which were used on the appeal, nor of the reasons upon which the affirmance of Sir *Thomas Plumer's* judgment proceeded. It must be observed that this decision is not strictly in unison with Lord *Thurlow's* judgment in *Stone v. Theed*; and it is not easy to understand how it was possible for the Master to state the proportion of the expenses of renewal to be borne by the tenant for life, since, according to settled principle, and the language of the decree, it was to depend upon the actual benefit which he should derive from the renewal, and which could not be ascertained until his enjoyment determined by his death. It does appear, however, by the Registrar's book, that the Master did, during the life of the tenant for life, report that a certain sum ought to be paid by him, and such report was submitted to without question.

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The rule of contribution between tenant for life and remainder-man, according to their actual enjoyment, has, however, this difficulty, — that in the cases of leaseholds for life, the time of renewal being necessarily uncertain, there are no means of ascertaining the proportion to be borne by the tenant for life until his death. In the case of leaseholds for years, when the period of renewal is certain, the trustees may retain an annual sum out of the rents and profits from the tenant for life, so as to insure a due contribution on his part towards the expense of renewal, as in the case of *Montford v. Cadogan (a)*; but this course cannot be adopted where the renewals depend upon the uncertainty of life. Where, in the case of leases for lives, the renewal is to take effect immediately upon the death of the testator, the trustees must, in the first place, have recourse to a mort-

(a) 19 Ves. 655.

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mortgage, since no rents can have accrued; and Lord *Eldon* observes in *White v. White*, that in such a case there seems no other mode of obtaining from the tenant for life his proportion of the expenses of renewal according to his enjoyment, than by compelling him to give security to that effect. If such security be not given, the remainder-man could only resort to the uncertain assets of the tenant for life; and neither of these modes is without objection.

In the present case, the testator having provided a fund for the expenses of the renewal, by an expression that may be considered to be ambiguous, the true intention of the testator with respect to that fund is to be collected from the whole will. His disposition of the leasehold estates is to the same trustees to whom he had before limited his freehold and copyhold property, and the first trust declared is, that the trustees, by and out of the rents and profits of such leaseholds, shall from time to time renew the several leases as occasion may require, and subject thereto he limits his leasehold property to accompany his freehold and copyhold in the same strict settlement. The trust as to the renewals, therefore, over-rides all beneficial interest in the leases, and such interest cannot take effect until this trust be performed; and in this respect it is distinguishable from all other cases that have occurred. The trust, therefore, like the expense of an embankment referred to by Lord *Thurlow* in the case of *Stone v. Theed*, appears by the intention of the testator to be considered as an incident to the property, which is from time to time to fall upon those who happen to be in possession of it under the will.

An argument has been urged here from the circumstance that the respective renewals became necessary immediately

immediately upon the death of the duke, and could not possibly be supplied out of annual rents and profits, and that the expenses of such renewal exceeded the amount of three years' annual rents of the leaseholds. If the trustees could not, in fact, have made the arrangement which enabled them to delay the payment of the fines thus accruing, until they were provided for out of the annual rents, I incline to think they would properly have applied towards the amount of the fines all other annual rents of freehold and copyhold property which the same persons would have been entitled to under the will, who were entitled to the leasehold rents subject to the fines. It is obvious that leaseholds, whether for lives or years, are not the proper subject of mortgage, and if the trustees had, in fact, been able to mortgage them in order to pay the fines, I am of opinion that, under the intention of the testator to be collected from this will, they would have been entitled to retain from the tenant for life the perception of the annual rents and profits until the mortgage was satisfied.

The declaration of the Court was to the following effect:—Declare that the Duke of *Marlborough*, as tenant for life of the freehold, copyhold, and leasehold property devised to him in trust by the will of the testator his father, is not entitled to any compensation in respect of the leasehold rents which have been hitherto applied in the expenses of fines and renewals; the Court being of opinion that the Duke of *Marlborough* and the other persons in remainder who shall be successively in possession of the same estates are bound to sustain all expenses of the several renewals of the leases which, during the period of their enjoyment respectively, are made necessary by the directions of the testator's will.

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On

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On a petition to the Master of the Rolls, which was afterwards presented by General *St. John*, the assignee of the Duke of *Marlborough*, praying for the transfer to him, as a trustee for the creditors, of the balance of the rents and profits of the leasehold estates, a reference was directed to the Master to inquire in what manner a fund for the payment of fines for future renewals might be best secured, having regard to the circumstance that some of the leases were held for lives and some for terms of years. The Master, by his report, approved of a proposal to insure each of the lives upon which the leases were held against the life of the Duke of *Marlborough* for a sum sufficient to provide for future renewals of the respective leases in case of any of the lives dropping during the life of the Duke of *Marlborough*, the annual premiums upon the policies to be paid by the receiver out of the rents and profits of the leasehold estates, unless the same should be paid by General *St. John*; and that report was afterwards, upon a petition presented with the concurrence of all parties, confirmed.

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JONES v. NOY.

ROLLS.
Nov. 19.

BY articles of partnership, dated the 16th of *February* 1815, between the Defendant *Noy*, who carried on the business of a solicitor, and *James Hardstone*, it was agreed that the partnership should continue for a period of twelve years, unless determined by either party at the expiration of the first five years; that, in consideration of 1500*l.* paid by *Hardstone* to *Noy*, the former should be admitted to one third share of the business; that *Noy* should take the charge of such department of the business as he should from time to time elect to superintend; and that he should further be at liberty to reside at the distance of ten miles from the house in which the business was carried on.

In *May* 1824, *Hardstone* became incapable of attending to the business in consequence of his being afflicted with insanity; and in *August* 1826, he died in a lunatic asylum. *Noy* continued to carry on the business until the end of the year 1825, when he sold the business to a person named *Templar* for the sum of 2000*l.*

The bill was filed by the executor of *Hardstone*; and it prayed for an account of the partnership transactions up to the time at which the business was sold, and of the money or other consideration received by the Defendant for such sale; and that one third part of the clear profits of the business, and also of the money or other consideration received by the Defendant for the sale of the business, might be paid to the Plaintiff.

The lunacy of a partner is not *ipso facto* a dissolution of the partnership, but is a ground for the dissolution, if the other partner or partners come to the Court for a decree of dissolution on the ground of such lunacy.

One of two partners having continued the partnership business for some time after the lunacy of the other, and having then sold the business, the representative of the deceased lunatic partner was held to be entitled to his share of the partnership profits up to the period of sale.

Mr.

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NOY.Mr. *Bickersteth* and Mr. *Norton*, for the Plaintiff.

The lunacy of a partner does not, of itself, operate as a dissolution of the partnership. It will afford a ground for the dissolution of the partnership, if the other partner or partners think fit to come to this Court to have the partnership dissolved; but it is in their election to take or to abstain from that course, and the partnership will continue, notwithstanding the lunacy, if they do not think fit to adopt it. This is the doctrine laid down by Lord *Kenyon* in *Sayers v. Bennet(a)*; and it is there said, that, when the Court dissolves a partnership on the ground of lunacy, it does not dissolve it with a retrospect to the time of the disorder commencing, if the continuing partner shall have abstained, for any period, from coming to the Court for a dissolution; because, as the lunatic's capital had been embarked during such continuance of the business, he was entitled to his share of the profits. It is not competent to a partner to take advantage of the infirmity with which his co-partner has been visited by the act of God, and, after continuing the business for an indefinite time with the joint capital, to claim, from the period at which his partner's malady may have commenced, the exclusive benefit of the profits. In the present case, the Defendant *Noy* continued to carry on the business for a considerable time after his partner was afflicted with the malady. What the representative of the deceased partner seeks, therefore, is to have an account of the partnership transactions up to the time at which the business was sold by the continuing partner, and an account of the produce of such sale, including what was given by the purchaser for the good-will.

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(a) 1 *Cox*, 107. *Montagu on Partnership*, p. 11.

Mr. *Pemberton* and Mr. *Jacob*, for the Defendant.

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In the year 1815 the Defendant *Noy*, being advanced in years and desirous of relieving himself from the labours of his business, took *Hardstone* into partnership; and the basis of the articles of partnership was, that the Defendant should live at a distance, and that *Hardstone* should undertake the active superintendence of the business. By *Hardstone's* incapacity, therefore, the Defendant was deprived of the whole benefit of the contract. It is true that a temporary infirmity, whether mental or bodily, with which a partner may be visited, does not operate as a dissolution of the partnership; but it is otherwise where the infirmity is permanent, and of such a nature as completely to disable the partner from discharging his share of the duties incident to the partnership business. The observations of Lord *Kenyon* in *Sayers v. Bennet* are perfectly consistent with the principle, that the permanent incapacity of a partner amounts to a dissolution of the partnership; and although the lunatic partner in that case had partially recovered, yet Lord *Kenyon* expressed a doubt how far such partial recovery ought to restrain him from decreeing a dissolution. In *Waters v. Taylor (a)*, Lord *Eldon*, confirming the general doctrine laid down by Lord *Kenyon*, observes, that "if a case had arisen, in which it had been clearly established, as far as human testimony could establish, that a party is what is called an incurable lunatic, and that he, by the articles, contracted to be always actively engaged in the partnership, and it was therefore as clear as human testimony could make it that he could not perform his contract, there could be no damages for the breach in consequence of the act of God; but it would be very difficult for a court of equity to hold one man to his contract, when it

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(a) 2 V. & B. 303.

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was perfectly clear that the other could not execute his part of it." The case here contemplated by Lord *Eldon* is precisely the case before the Court. The deceased partner did contract to be actively engaged in the business, and he did become, by reason of his malady, incapable of fulfilling his contract. This is the case, moreover, of a professional business, which is distinguishable, according to several recent decisions, from a mercantile business; inasmuch as, in the former case, the benefit of the contract depends in a much higher degree upon personal skill and attainments, and it may be impossible to compensate for the loss occasioned by the infirmity of the partner who becomes incapable of continuing his services. Nothing could be more inequitable than that the representative of the deceased partner should be held entitled to an equal share of profits made, not by the joint labours of both partners, but by the sole labour and the sole skill of one.

With respect to the claim to a share of what is alleged to have been a consideration for the good-will of the business, it is established that a court of equity will not recognise or support a claim to good-will in a professional business. The personal skill of a solicitor cannot be transferred; the transfer of his business cannot, therefore, in equity, be made the subject of contract, nor can his clients or professional connections be assigned for a pecuniary consideration. *Farr v. Pearce* (a), *Spicer v. James*. (b)

Mr. *Bickersteth* in reply.

It is not denied that the insanity of a partner is a ground for the dissolution of the partnership, but it is not

(a) 5 *Mad.* 78.

(b) *Rolls*, Mich. term, 1830.
Collyer on Partnership, 82.

not *ipso facto* a dissolution of the partnership; and the question is, whether, as the Defendant has taken no steps to procure a dissolution, the partnership can be considered as dissolved. It is clear, according to all the authorities, that the mere temporary derangement of a partner does not of itself put an end to the partnership. Suppose a bill were filed for the dissolution of a partnership on the ground of the lunacy of a partner, and the lunatic were to recover before the hearing of the cause; it is clear that in such a case the Court could not pronounce a decree of dissolution. This was to a certain extent the case in *Sayers v. Bennet*, for there the lunatic had partially recovered. The loss occasioned to the continuing partner by reason of his being deprived of the benefit of his co-partner's services is a fit subject for compensation, but not a ground for dissolution of the partnership, if the continuance of the partnership has been acquiesced in.

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NOY.

With respect to the question as to the good-will, what is meant by an agreement for good-will in the case of a professional business is not that the retiring professional person contracts to transfer what is incapable of being made the subject of transfer, namely, his own industry and skill; but that he contracts to use his influence in recommending the party succeeding him to his clients, the exercise of which influence may well be made the subject of pecuniary contract. This distinction was recognised by Lord *Eldon* in the case of *Bateman v. Willan*, where the good-will of a physician was the subject of transfer.

The MASTER of the ROLLS.

It is clear upon principle, that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining

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the contract. The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity; but it may not, in the result, prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but in that case I consider with Lord *Kenyon*, that, in order to make it a ground of dissolution, he must obtain a decree of the Court. If he does not apply to the Court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution.

The question, therefore, here is, whether it is not to be considered that between *May* 1824, when *Hardstone* was first affected with insanity, and 1825, when the business was sold, *Noy* carried on the business in the hope that the insanity of his partner would prove only temporary, and would not therefore render a dissolution necessary. I am inclined to think that *Noy* did carry on the business till 1825 in the hope of his partner's recovery; and I am further disposed to give to the Plaintiff, the representative of *Hardstone*, the profits of *Hardstone's* share of the partnership up to the period at which the business was sold.

With respect to the question of good-will, the Court is not in a situation to decide it until the facts of the case shall have been ascertained upon a reference to the Master to inquire what were the terms made by *Noy* with the purchaser of the business.

1832.

KIRKBY v. WRIGHT.

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ROLLS.
Jan. 25.

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L. C.
Nov. 23. 25.

THE Defendant *Griffith Wright*, on the 1st day of *January* 1819, sold his stock in trade and good will in a certain newspaper concern to the Plaintiffs for a sum of 3700*l.*, and the Plaintiffs thereupon executed to the Defendant a joint and several bond for the payment of that sum by instalments. The Defendant signed a memorandum at the foot of the bond in the following words: — “ Provided always, and it is hereby agreed, that in case the whole concern sold by the above named *Griffith Wright* to the above bounden *Thomas Kirkby*, *Thomas Inchbald*, and *William Gawtress*, and the present printing business of Messrs. *Inchbald* and *Gawtress* added to it, do not produce a net profit of 4000*l.* by the said 1st day of *July* 1822, he the said *Griffith Wright*, his heirs, executors, or administrators shall and will allow to them the said *Thomas Kirkby*, *Thomas Inchbald*, and *William Gawtress*, at that period, such sum of money as will, with the profit they the said *Thomas Kirkby*, *Thomas Inchbald*, and *William Gawtress* may make from the said two businesses, amount to and be the clear profit of 4000*l.* during that time.”

The vendor of a trading concern guaranteed the net profit of the business sold, and of another business, in which the purchasers were also engaged, at a certain specified sum: Held, that this guarantee applied to the profits made by the two concerns, after deducting the interest allowed on the amount of further capital advanced by the purchasers for the purpose of carrying on the concerns.

After the 1st day of *July* 1822, the day named in the memorandum, the Plaintiffs and Defendant differed as to the sum to be paid by the Defendant to the Plaintiffs by virtue of the memorandum, the profits of the two concerns not having amounted to 4000*l.*; and the bill was filed by the Plaintiffs to enforce the claim which they made in that respect.

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At the hearing of the cause, the Master was directed to take an account of the profit made by the Plaintiffs in the said several businesses up to the 1st day of *July* 1822, and to ascertain the amount of the Plaintiffs' demand on the Defendant in respect of the memorandum.

The Master, by his report, certified that a sum of 1105*l.* 7*s.* 1*d.* was due from the Defendant to the Plaintiffs in that respect.

In taking the account the Master allowed to the Plaintiffs interest at the rate of 5 per cent., being the interest which they had paid on certain sums borrowed by the partnership, and also on certain sums advanced by individual partners for the purpose of carrying on their businesses, and he deducted the amount of such interest from the gross profit.

The Defendant took an exception to the report on account of this allowance, so far as it related to the interest upon advances made by the partners themselves.

Mr. *Pemberton* and Mr. *Barber*, in support of the exception, submitted, that the expression "net profit" must, in the circumstances of this case, be taken to mean the difference between the monies actually expended and the amount of the returns. It was plain, from the nature of the agreement, that the Plaintiffs were to undertake to conduct the business with the capital and stock then invested in it.

The counsel for the Plaintiffs were not called upon to argue the question.

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The argument of the Defendant's counsel would have much weight if the term "profit" only were found in the agreement, but the expression is "net profit," and this interest is a charge which must be deducted before the profit can be considered to be net. In order to arrive at the intention of parties to an agreement, effect must be given to every word.

The Defendant presented an appeal against his Honor's decision.

1853.
Nov. 19. 25.

The Attorney-General (Sir W. Horne), and Mr. Barber, in support of the appeal.

The judgment of the Court below was founded solely upon the expression "net profit," as if that were something different from ordinary profits. The distinction, however, is fallacious; for whatever may be the case in calculations as between partners themselves, every thing derived from a business is to be considered as profit with reference to third parties. The returns yielded by a capital embarked in a trade equally constitute the profits of the trade, whether they fall short of or exceed the amount of interest which the trader may have to pay for the use of that capital if he borrows it, or which, if the capital be his own, he might obtain by lending it to another. A merchant whose gains upon a capital of 10,000*l.* amount to 800*l.* a year, is correctly said to draw a profit of 8 per cent. from his business, although upon the principle of the decision under appeal, his profits ought to be rated at 3 per cent. only; and if the 800*l.* be a clear sum after paying the salaries of his clerks and the other expenses of his mercantile establish-

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KIRKBY

v.

WRIGHT.

ment, that will be the amount of his *net* profits. It was to costs and charges of the latter description only that the expression "net profit" in the memorandum was intended to apply. To construe the agreement otherwise, would be to place Mr. *Wright* entirely at the Plaintiffs' mercy. By borrowing additional sums from others, or advancing them from their own resources, the purchasers might, at their discretion, enlarge their concerns to an indefinite extent; while the risk and responsibility of such a proceeding would be thrown indirectly on Mr. *Wright*, who would thus in effect be held bound to provide whatever capital they might consider necessary in order to carry on their trade.

Sir *E. Sugden* and Mr. *Hayter*, *contra*.

It can make no difference in estimating the net profit of a trade, whether the computation is to be made as between partners themselves, or as between them and a third party. In either case the interest paid by the concern upon monies borrowed from strangers, or (which is substantially the same thing) allowed upon advances made by individual partners, must be first taken into the account and deducted from the returns, before the net profit can be reached. The interest allowed upon such advances forms as much an item in the necessary expenditure of the concern as the ordinary costs and charges incident to its management. The very circumstance, that no exception has been taken to the sums allowed by the Master in respect of the interest on monies borrowed from third parties for the purpose of carrying on these concerns, is a tacit admission on the Defendant's part, that the purchasers were to be at liberty to increase the capital originally embarked in them, provided such increase were made *bonâ fide*; and in point of principle, sums lent by strangers, and sums advanced

advanced by members of the partnership out of their private resources, must stand on precisely the same footing. There is no suggestion here that the sums upon which interest is claimed have been colourably or improperly advanced. *Non constat* that but for the application of the new capital, the amount of net profit might not have been greatly less than it has proved. On the contrary, the presumption must be, that the concerns have been largely benefited, and the rate of profit increased, by the additional capital employed; and if that be the case, it would be in the last degree monstrous and unjust that the Defendant should reap the whole of the advantage which has resulted solely from the sagacity and enterprise of the purchasers.

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The LORD CHANCELLOR.

Nov. 25.

It is peculiarly necessary, in a case of this description, to examine what was the real nature of the transaction, and what it was that the parties intended to effect by the proviso.

Mr. *Wright* had sold to Messrs. *Kirkby* and Co., then carrying on the business of printers, the concern of a newspaper, to be paid for by instalments. To the bond for securing those instalments is added a proviso, to be taken as an agreement, the plain purpose of which is to guarantee a certain amount of profit upon the concern sold. As the purchasers had their own printing concern besides, and as from the nature of the thing the two concerns were, of necessity, to be carried on together, so that the accounts of their profits could hardly be kept separate, it was equally necessary that the guarantee should cover and apply to the amount both of the former trade of the purchasers and of the new concern they were about to

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 v.
 WALTON.

embark in. But it was clearly the profits of the latter which formed the object of the guarantee by the vendor.

This concern, then, was warranted profitable up to a certain amount. What concern? at what time? and in what state? Manifestly the concern sold—at the time of the purchase—and in the state in which it then was. To put another construction upon the guarantee would be doing great violence to the plain import of the whole transaction. Mr. *Wright* was simply saying, “You who have bought my newspaper shall be secure of making 4000*l.* net profit by it in the course of the first three years and a half of your possession, including the net profit of your printing business, which you will naturally blend with it.”

In estimating this profit, of course no deduction whatever was to be made for interest of the capital invested in the purchase. The seller was guaranteeing the value of that purchase, the profits of that capital so invested. He was undertaking to make that capital yield so much as, with the printing profits, should amount to the sum of 4000*l.* up to *July 1822*.

But if any new capital was invested, the interest of that capital was another and a separate matter. Such interest must be deducted from the profits, in order to get at the guaranteed profits of the concern sold. If not, this absurd consequence would follow, that if a large additional sum were brought into the concern—whether borrowed or advanced by the partners themselves can make no difference—if the ordinary interest of that sum were received from the concern and no more profit made upon it; nay, if the whole concern were only to yield 4 or 5 per cent. upon that and the original purchase-money also, the guarantee might be satisfied,

Mr.

Mr. *Wright* adding to the net profits of the concern as sold the profits of the new capital. And thus the guarantee would turn out to be a guarantee of common legal interest; in other words, would be good for nothing, and be the very reverse of what it was intended to be.

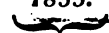
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The acting of the parties is consistent with the construction adopted by the Master, and aids that construction. But my opinion is formed upon the nature of the transaction and upon the words of the proviso "whole concern sold," "net profit," "clear profit." There is no occasion to lay down any general rule as to the effect of the expression "net profit." It would, indeed, be preposterous to speak of such an expression as having an inflexible sense.

There may be cases in which the use of such expressions would not exclude the interest of capital from the calculation of profit. Indeed, in this case, from the plain meaning of the instrument, the interest of the capital invested in the purchase is excluded, although very possibly the parties in their accounts kept with each other, entered a sum for interest of that capital, as well as of any additional sums borrowed for, or otherwise brought into the concern.

The appeal must be dismissed with costs.

1833.



Nov. 19. 25.

FOLEY v. PARRY.

Where a testator gave his real estates, and also his residuary property to his wife for life, with remainder to an infant great nephew for life; a statement in the will that it was his particular wish and request that his wife and the infant's grandfather would superintend and take care of the infant's education, so as to fit him for any respectable profession or employment, was held, under the circumstances, and upon the effect of the whole instrument, to charge the maintenance and education of the infant upon the interest taken by the testator's widow under the will.

WILLIAM PARRY, by his will duly attested, devised his mansion-house and estates in the parish of *Kinchester* to trustees and their heirs, to the use of *Jane Parry*, the testator's wife, for life, without impeachment of waste, and after her decease to the use of his great nephew *William Walter Foley*, described as the son of the testator's late nephew *William Foley*, for life, without impeachment of waste; remainder to his issue successively in tail, with an ultimate remainder to *Thomas Mell* in fee. The testator next proceeded to give directions to the trustees for the sale of the estates, or any portion of them, with the consent of the wife, and for the application of the proceeds of such sale. He then bequeathed all his plate, linen, china, books, household goods, furniture, and farming stock, in and about his said mansion, to his said wife for her own use absolutely; and after giving divers pecuniary legacies, charged upon his residuary estate, he gave and bequeathed all his residuary estate, both real and personal, to his executors, upon trust to convert the same into money; and after payment thereof of his funeral and testamentary expenses and debts, to invest the surplus on real or government security, and pay the dividends to his said wife for her life, and after her decease, on trust as to the capital, for the absolute use of the said *William Walter Foley*, to be paid or transferred to him at twenty-one. The will then contained this clause:—"It is my particular wish and request, that my dear wife and *Walter Williams*, Esq., the grandfather of the said *William Walter Foley*, will superintend and take care of his education, so as to fit him for any respectable profession or employment." The will also contained various

various other directions and provisions, which were expressed in formal and technical language; and it concluded by nominating the testator's wife and *B. C. Williams* his executrix and executor. *Walter Williams* took no benefit under the will; and, except in the clause above stated, his name was not mentioned in any part of it.

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The testator died in *November* 1813, leaving *William Walter Foley*, then an infant; and *William Walter Foley*, some time afterwards filed his bill against the executors and trustees, praying, among other things, a declaration that, upon the true construction of the will, he ought to have been maintained and educated, so as to fit him for a respectable profession, out of the annual proceeds of the testator's estate, devised to the widow for life, or, at least, out of the capital of the residuary estate.

It appeared from the evidence in the cause that, in the year 1810, the testator, with the concurrence of the Plaintiff's maternal grandfather *Walter Williams*, the Plaintiff's father having then recently gone to *India*, placed the Plaintiff at school, and continued to take charge of his education up to *Midsummer* 1813, and that the expenses of the education, with the exception of some small sums for clothes (which were paid, as the answer stated, out of the testator's own pocket) were defrayed out of a sum of 190*l.*, left in the hands of the testator by the Plaintiff's father immediately before his departure from *England*; that the exact amount of the various disbursements on this account were regularly entered to his credit by the testator in an account book which was proved in the cause, and in which he debited himself with the sum deposited, and took credit for the several items of his expenditure, and that there was still of that money in his hands, remaining unapplied at
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the time of his death, a considerable sum, which, on the application of *Walter Williams*, was paid over to the latter by the executors.

At the hearing of the cause, the Vice-Chancellor made a declaration, that the Plaintiff was entitled to be maintained and educated out of the rents, profits, and annual income of the testator's real and personal estates from the decease of the testator up to the age of twenty-one, in such a manner as to fit him for any respectable profession or employment, regard being had to the fortune given him by the will, and which he was entitled to, expectant on the death of the testator's widow. (a)

Mrs. Parry appealed against this part of his Honor's decree.

Mr. Knight and *Mr. Duckworth*, in support of the appeal.

The question is, whether the clause, stating it to be the testator's particular wish and request, that his dear wife and the Plaintiff's grandfather should superintend and take care of the Plaintiff's education, so as to fit him for any respectable profession or employment, creates a trust as against the widow for the benefit of the tenant for life in remainder during his minority. For the purpose of determining this question, it is proper to consider the general frame and character of this will, as well as the particular clause upon which the Plaintiff relies. Now the will is a formal instrument, obviously prepared by a conveyancer, and containing a great variety of special limitations and provisions skilfully and technically drawn. If the testator had meant to cast such a burthen on his widow, would he not have said so in direct and express terms? Why should he have left

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(a) 5 Sim. 138.

a matter of such importance to depend upon an inference, and that, too, an inference of the most doubtful kind? Mrs. *Parry*, who is the more immediate and natural object of his bounty, herself takes, like the Plaintiff, a mere life interest in the devised estates and in the residuary property. The result of his Honor's decision, if carried into effect, will be to cut down the amount of the income which the testator allowed for his widow from a liberal to a very moderate provision, especially in the later years of the Plaintiff's minority, during which large sums have been claimed and allowed for the purpose of completing his education, and paying a heavy apprentice fee to advance him in a profession.

1838.

 EQUITY
 &
 PARRY

With respect to the construction of the clause itself, there can be no doubt upon the general doctrine, that words of mere recommendation may create a trust, provided all the requisites are to be found concurring in the clause relied upon for that purpose. These are, first, that the words shall import trust and not simply request; secondly, that the property which is to be the subject-matter of the trust shall be clearly defined; and, thirdly, that the objects of the trust shall be distinctly specified; *Cruwys v. Colman* (a), *Wright v. Athyns*. (b) The clause under consideration is defective in every one of these particulars. In the first place, how can it be said that any trust is here imposed? Who are to be the trustees? As far, at least, as *Walter Williams* is concerned, the passage relied upon is no more than the expression of a wish, and certainly a very natural wish, that Mr. *Williams* would look after the education of his grandson. But that gentleman takes no benefit under the will, and cannot, therefore, be affected by any appeal of this kind farther than his own sense of propriety may dictate. How then is it possible to consider the clause

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(a) 9 Ves. 319.

(b) 1 Turn. & Russ. 143.

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as operating in a different manner upon the widow, who is associated in this duty with Mr. *Williams*, and who is named in exactly the same words? She, it is true, takes a life interest in the testator's real and residuary estates; but those estates are given to her by formal limitations, and in a preceding and totally distinct part of the will; and there is no pretence for saying that the superintendence, much more the expense, of the Plaintiff's education, is made a condition of the prior gift. A "particular wish" implies an option in the party to whom it is addressed, and is, at any rate, not so strong as an expectation. Now it has been held that words of expectation in a will, not amounting to a recommendation, will not create a trust; *Lechmere v. Lavie*. (a) Again, how is the burthen to be borne? On what property is it to attach? None whatever is pointed out; and it is only by an unwarranted presumption that the provisions so anxiously made by the testator for his widow are held to be fixed with this large and fluctuating charge. What, lastly, is the object of the supposed trust? It is to superintend and take care of the Plaintiff's education, so as to fit him for a respectable profession: a form of expression which, upon no fair construction, can ever be considered as equivalent to directing that the expense of such superintendence and education shall be borne by the persons to whose sense of generosity and gratitude the delicate task is confided.

Sir *E. Sugden* and Mr. *Spence*, *contra*.

The circumstances appearing upon the Defendant's answer and in the evidence in the cause abundantly prove that the testator had himself undertaken the burthen of maintaining and educating this favourite great nephew, whom he destined to be his heir, and that he

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(a) p. 197. *infra*.

meant that burthen to devolve, with his estate, upon his widow, who was to receive for her life the great bulk of his property and therefore substantially to stand in his place. Could the testator, who well knew that the Plaintiff was entirely dependent upon his bounty, have intended to leave him the reversionary heir to his estates, and yet make no provision for his being brought up and educated in a manner suitable to the station he was afterwards to fill? Could he intend that the direction with respect to his wife and Mr. *Williams* taking charge of the infant's education was to be an idle mockery—the mere expression of a wish, to which the widow at her own discretion might or might not give effect? There is no reason why this may not be a trust as regards both the individuals who are named. If the clause in its operation imposes a charge only upon the widow, still it may well be considered as imposing a trust both upon her and Mr. *Williams*, who was probably associated in the office as being the nearest male relative of the infant, and as an individual on whose assistance and advice Mrs. *Parry* might safely rely. To constitute a person a trustee by words of recommendation or entreaty, it is not necessary that he should take a beneficial interest. Where a testator desires his debts to be paid by executors, who take benefits under his will, and by a stranger who takes nothing, the latter is interposed as a trustee to see to the application of the money, though he cannot be called upon like the others to provide the funds. This is exactly the position of Mr. *Williams*. The request that he and Mrs. *Parry* would superintend the education of his grandson clearly amounts to a direction to that effect; *Harding v. Glyn* (a), and it constitutes in reality a debt; but the burthen falls exclusively upon her, who having received property sufficient to answer the charge, took the trusts under an implied obligation

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v.
PARRY.

(a) 1 Atk. 469.

1893.

FOLEY

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PARRY.

obligation to fulfil to the extent of her means the wishes of the donor. There is no charge upon the capital of the fund, nor even upon the interest of the widow directly; but the required act is to be done by the aid and out of the property coming to the person upon whom the duty is imposed.

Mr. *Knight*, in reply.

Nov. 25.

The LORD CHANCELLOR.

The question in this case arises not so much upon the construction of the words in the disputed clause, because if these stood alone and the Court were called upon to pronounce whether or not they amounted to a charge upon the life interest given to the widow in favour of the nephew, for the expense of his maintenance and education, and settlement in a profession, it would be impossible to say that of themselves they were sufficient for that purpose. The Plaintiff's grandfather, who takes nothing under the will, is joined with the wife, and the words of wish and request are addressed to both equally. The words, too, though abundantly strong as regards the requisition, are feeble as regards maintenance; and are susceptible, though barely susceptible, of a different construction; namely, as intended only to entrust the widow and grandfather with a general superintendence in the nature of guardianship, which by law the testator could not formally and absolutely create.

But the Court is not confined to the particular clause. It is entitled to look through the whole instrument; and if it appears from the whole that the maker of it could have had but one intention, that is to say, if he cannot, without straining after a bare possibility, be supposed to have had any other meaning in the words used than

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to express a wish or desire that the devisee should perform a given duty by means of the fund given, that fund is as much affected with a trust as if the most precise and formal words had been employed. It is impossible to read this will and weigh the whole of its contents without coming to the conclusion that the testator wished, that is, directed his nephew to be maintained and educated by his wife; and I think he only comprehended the grandfather in the recommendation with a view to obtaining for his widow the assistance of that male relative of the infant in performing those offices, the expense of which the widow was to pay out of her legacy.

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v.
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It cannot be denied that the precatory words are as strong as in almost any of the cases on the subject, and much more precise than in most of them. The cases of *Mason v. Limbury* (a), *Harding v. Glyn* (b), *Pierson v. Garnet* (c), *Brown v. Higgs* (d), and many others which might be referred to, sufficiently prove that such expressions as "desire," "request," "recommend," nay, even "authorise and empower," are sufficient to impose an obligation which this Court will enforce.

The last-mentioned case was the subject of very great discussion; and after being fully considered at the Rolls by Lord *Alvanley*, it was heard before Lord *Eldon* on appeal, and was finally decided in the House of Lords. The question, whether the words there employed gave a power, which, having been unexecuted, the Court could not execute, or created a trust which the Court would cause to be performed, was argued, not upon the clause itself, but upon the whole context and circumstances of the will, as were, indeed, many of the other cases from

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(a) Cited in *Ambler*, p. 4.

(d) 4 *Ves.* 708. 3 *Ves.* 495.

(b) 1 *Atk.* 469.

8 *Ves.* 561.

(c) 2 *Bro. C. C.* 38. 226

1833.

FOLEY

v.

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The Duke of Marlborough v. Lord Godolphin (a) downwards; and although the import of the words themselves, as far as regards the question whether they are mandatory or not, in the present instance, is quite plain enough without going to the rest of the instrument; yet recourse must be had to the context and circumstances here, as in those cases, for the purpose of discovering the object to which the directions were pointed; and from them it is clear, that this could have been no other than maintenance and education, until the infants should attain majority and be settled in a respectable profession. Lord *Redesdale* observes in a very distinct statement of the doctrine of the Court on this subject in *Cary v. Cary* (b), that if the objects to which a will refers are so defined that a Court can act upon the desire expressed, then words of desire are imperative upon the person to whom they are addressed; and the objects are here, as gathered from the words and the context and circumstances disclosed on the face of the will, not superintendence merely of education, while the infant starved to whom the absolute property is given in reversion expectant upon the widow's life interest; but superintendence and taking care of his education so as to fit him for a respectable profession, in all which his support must be comprehended.

I have therefore come to the same conclusion as his Honor, not intending by any means to say, what no one can indeed maintain, that education by itself implies always maintenance, or that superintendence by itself implies support, or even that "taking care," though much stronger in this sense, must needs signify in every case defraying all expenses; but that, in the present instance, there is no rational way of construing the will except by giving such a meaning to those expressions.

I have

(a) 2 Ves. sen. 61.

(b) 2 Sch. & Lef. 173.

I have examined all the cases, with the view of finding if there was any one that could be deemed repugnant to the construction which his Honor has here adopted, and I find none of them opposed to that construction, and many confirmatory of it.

1838.

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v.
PARRY.

BRITTAIN v. FLEMING.

ROLLS.
Nov. 18.

THE testatrix, *Mary Smith*, being seised of an undivided third part of an estate in houses, to which her two sisters were entitled in other undivided third parts, and *Joseph Brittain*, the husband of the Plaintiff, being employed by the three sisters as receiver of the rents of the whole estate, the testatrix made a codicil to her will in the following words:—“And my mind and will are, that in case the said *Joseph Brittain*, who now collects the rents of the *Newington* estate, the property of my late father, shall become incapable to collect, or shall be discharged from collecting the said rents, then and in such case I give and bequeath unto him and his present wife *Margaret*, and the survivor of them, one clear annuity or yearly sum of 100*l.* during their respective natural lives, which annuity I hereby direct to be paid quarterly, to commence and become payable on the first quarter day following my decease, or on the first quarter day after the said *Joseph Brittain* shall cease to collect the said rents, as the case may be.”

A testatrix gave to *J. B.* and his wife, and the survivor of them, an annuity of 100*l.* during their respective lives, in case *J. B.* should become incapable to collect, or be discharged from collecting the rents of a particular estate; the annuity to commence and become payable from the first quarter day after her decease, or after he should cease to collect the rents. The husband survived the testatrix, but died soon afterwards, having continued to receive the rents till his death. The wife is entitled to the annuity of 100*l.* for her life.

Joseph Brittain survived the testatrix, and died soon afterwards, having continued in the office of receiver up to the time of his death. The question in the cause was, whether the plaintiff, his widow *Margaret Brittain*, who survived him, was entitled under the will of the testatrix to the annuity of 100*l.* during her life.

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Mr.

1833.

BRITTAIN
v.
FLEMING.

Mr. *Bickersteth* and Mr. *Koe*, for the Plaintiff.

It is clear that this testatrix meant her bounty to take effect in favour of the receiver and his wife during their respective lives, in whatever way the services of the receiver might determine. The annuity is to be paid to the wife if she survive her husband, and the payment is to commence the first quarter day after the husband has been discharged, or has become incapable, or ceased to collect. Has he not ceased to collect, and is not death incapacity to act? The testatrix has contemplated the possibility of his being discharged from the situation of receiver by her surviving sisters, and as she has made a provision for him and his wife in the event which supposes the less meritorious consideration for her bounty, is it probable that she intended to deprive the widow of the annuity in the event of there being a stronger claim upon her bounty by reason of the husband having died in the service of the family?

Mr. *Tinney* and Mr. *Spence*, *contra*.

The question is not, whether the event which has happened gives the widow a stronger claim to the bounty of the testatrix, but whether the testatrix contemplated and provided for that event. The annuity is not given to the widow at all events; she is to take after her husband, and the husband was to take in two events, neither of which has happened. He did not become incapable to collect, and he was never discharged. Death, and incapacity to act are distinguished in legal language, as in the common clauses of conveyances providing for new trustees: they are no less distinguished in common parlance, and were certainly not confounded by this testatrix. Death, no doubt, includes incapacity to act; but to say that the incapacity to act, contemplated

plated by this testatrix, includes death, is to argue that the less contains the greater.

The MASTER of the ROLLS.

The true intention of the testatrix appears to be, that when the profits of the office of receiver should cease, *Joseph Brittain*, if living, or his wife if surviving him, should enjoy the annuity given by the testatrix in lieu of those profits, and the Plaintiff is, therefore, entitled to the annuity during her life.

1833.
BRITTAIN
v.
FLEMING.

SHERRATT v. BENTLEY.

THE will of *William Harrison*, so far as it is material, was in the following words:—“ First, I direct the payment of all my just debts, funeral expenses, and the charges of proving this my will, and also the legacy of my sister, *Sarah Stonier*, for her life, and afterwards to her son *John*, under my late father’s will, when the same shall become due and payable. Also I give and bequeath unto my executors hereinafter named the sum of 400*l.*, upon trust that they, or the survivor of them, their executors, administrators, or assigns, do and shall put and place the same out to interest on government or such other security or securities as they shall think proper, and do and shall pay and apply the interest, dividends, and produce of the said sum of 400*l.* to *Henrietta Slater*, daughter of *Ann Robotham*, for and during the term of her natural life; and from and after her decease, then I give and divide the said sum of 400*l.* to and amongst all and every of the lawful child or children of the said *Henrietta Slater*, share and share alike, when

ROLLS.
Nov. 22.
Dec. 2. 21.
1834.
L. C.
Nov. 5, 6, 7.
If the general intention of a testator can be collected upon the whole will, particular terms used, which are inconsistent with that intention, may be rejected as introduced by the testator’s mistake or ignorance of the force of the words used.
Where the latter part of a will is inconsistent with a prior part, the latter part will prevail.

1833.

 SHERRATT
 v.
 BENTLEY.

and at such time as such child or children shall severally attain the age of twenty-one years, and in case any of them shall die before his or her legacy shall become due and payable, leaving lawful issue, such issue to take and be entitled to their parents' part or share. But in case the said *Henrietta Slater* shall depart this life without leaving lawful issue, then I give, devise, and bequeath the said sum of 400*l.* unto my loving wife *Margaret Harrison*, to dispose of the same in what way and in such manner as she may think proper. I give, devise, and bequeath unto my said wife *Margaret Harrison* the messuage or tenement situate at *Doveridge*, in the said county of *Derby*, with the hereditaments and appurtenances thereunto belonging, which I lately purchased of *Mr. Joseph Sadler*, and all other my real estates whatsoever and wheresoever, and also all my household goods, furniture, implements of household, the stock upon my farm, as well quick as dead, and also my ready money, monies out upon securities, and all other my personal estates whatsoever and wheresoever, and of what nature or kind soever, to hold to my said wife, her heirs, executors, administrators, and assigns for ever. I further order and direct that none of the legatees, as before mentioned, shall be entitled unto the whole or any part of his, her, or their legacy or bequests so bequeathed, until the full term and end of twelve months after my said wife *Margaret Harrison's* decease, and in case my said wife shall happen to die in my lifetime, and the before-mentioned devises and bequests to her thereby lapse, I do give, devise, and bequeath the estate and effects, as well real as personal, comprised therein, to my brother-in-law *William Sherratt*, his heirs, executors, administrators, and assigns, upon trust that the said *William Sherratt*, his heirs, executors, administrators, and assigns, do and shall stand and be seised and possessed thereof respectively, to the use of
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such person or persons, and for such estate and estates, intents and purposes, and in such manner and form as my said wife shall in her lifetime, by any writing under her hand, direct or appoint the same. I hereby further give unto my sister *Ann Smith* the interest of 250*l.*, and at her decease the said principal or sum of 250*l.* to be equally divided amongst her children, share and share alike. I give and bequeath unto my brother *Thomas Harrison* the interest of 200*l.*, and at his decease the said principal or sum of 200*l.* to be equally divided amongst his children, share and share alike. I give unto my sister *Coxon's* children, (viz.) *William Coxon*, *Michael Coxon*, and *Eliza Wagstaff*, the sum of 50*l.* each. I give and bequeath unto *Elizabeth Sherratt*, daughter of *William* and *Hannah Sherratt*, the sum of 600*l.*, and provided she dies leaving no lawful issue, then I give the said sum of 600*l.* unto the whole of her brothers and sisters, excepting *John Sherratt*, share and share alike. I also further give, devise, and bequeath unto *William Allen*, jun., of the *Windy Bank*, and the whole of my brother-in-law, *William Sherratt's*, children, the rest, residue, and remainder of my real and personal estates, of what kind and sort soever and wheresoever, to be equally divided amongst them, share and share alike, at the decease of my said wife *Margaret Harrison*."

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 v.
 BENTLEY.

The will then contained the usual clauses, authorising the executors to reimburse themselves their reasonable costs and charges, and declaring that they should severally be answerable for their own wilful neglect or default only; and it concluded by appointing the testator's wife, *Margaret Harrison*, and his brother-in-law, *William Sherratt*, his executrix and executor.

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 v.
 BENTLEY.

After the death of the testator, his widow, *Margaret Harrison* intermarried with the Defendant *Bentley*, who survived her; and who, upon her decease, became entitled, by virtue of an appointment made in execution of a power reserved to her on her second marriage, to whatever interest she took under the will of *Thomas Harrison*.

The bill was filed for the purpose of obtaining the opinion of the Court upon the construction of the will; and the material question, which came to be discussed on further directions, was whether, under the will above stated, *Margaret Harrison* took the real and personal estate of the testator absolutely, or for life only; or whether, as was insisted on behalf of the testator's heir at law and next of kin, the will, or the greater part of it, was void for uncertainty.

Mr. Pemberton and *Mr. Temple*, for the surviving executor.

Mr. Wright, for the heir at law, contended, first, that the will was void for uncertainty; and, secondly, that, if the Court did not arrive at that conclusion, the clause which cut down the absolute interest given to the wife in the prior part of the will to an estate for life must be considered as operative, upon the principle that, where there was a repugnance between two clauses in a will, the latter clause would prevail over the former.

Mr. Dixon, for one of the next of kin.

The rule that the latter part of a will shall prevail over the former is applicable only to cases where the provisions in the prior and subsequent parts of the will are plainly inconsistent. Thus in *Sims v. Doughty* (a),

Lord

(a) 5 Ves. 247.

Lord *Alvanley* says, "If two parts of a will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention. The Court is in a dilemma, and cannot act at all, unless they do that." The same learned Judge, in *Constantine v. Constantine* (a), adheres to the opinion he had given on this point in *Sims v. Doughty*, and further lays down the principle that, where it is wholly doubtful in what manner a testator's meaning is to take effect, the will must be declared void for uncertainty. The present case falls within this principle, since it is impossible to say how the provisions of this will can be carried into execution. In *Mohun v. Mohun* (b), where the testator made a general bequest to all his grandchildren in one part of the will, and to his grandchildren and nieces in another, the will was declared void for uncertainty, and Sir *Thomas Plumer* observed, that "the Court could not insert or transpose words for the purpose of giving a meaning to instruments which had none." Now in the present case it is sought to transpose not merely words, but whole clauses, in order to give effect to an instrument which is, upon the face of it, unintelligible.

Mr. *Bickersteth* and Mr. *Jacob*, for parties interested in the dispositions made by the testator in the latter part of his will.

The case of *Doe dem. Leicester v. Biggs* (c) was decided by Sir *James Mansfield* upon the general rule that, where there is a repugnancy, the first words in a deed, and the last words in a will shall prevail; and that rule is recognised by Lord *Eldon* in *Wykham v. Wykham*. (d) The case of *Coryton v. Helyar* (e), before Lord *Hardwicke*, which

(a) 6 *Ves.* 100.

(b) 1 *Swanst.* 201.

(c) 2 *Taunt.* 109.

(d) 18 *Ves.* 421.

(e) 2 *Cox*, 340.

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 v.
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which is noticed with approbation by Lord *Eldon* in *Wykham v. Wykham*, and which, since the date of *Wykham v. Wykham*, has been published by Mr. *Cox*, was also decided upon the ground of the preference which is to be given to the latter limitations in a will, when repugnant to a prior disposition. In that case Lord *Hardwicke* held, that an absolute term for ninety-nine years, given in a prior part of the will, was so cut down by a subsequent limitation, that it was not to be deemed an absolute term, but a term determinable on the death of the testator. As to *Mohun v. Mohun (a)*, that case is perfectly distinguishable from the present; for there the thing given was as ambiguous as the persons intended to take, and there being complete uncertainty both in the subject and in the objects of the bequest, it was impossible for the Court to give any effect to the instrument.

Mr. *Tinney* and Mr. *G. Richards*, for the Defendant *Bentley*.

Taking the whole will together, it appears to have been the general intention of this testator to give to his widow an absolute interest in the whole of his real and personal property. The power of appointment given to her in case she should die in his lifetime, however inoperative, — and such a power might certainly be rendered nugatory by any subsequent disposition of the testator — tends to confirm the testator's general intention in favour of his widow. Not only is the testator anxious that his widow should possess his whole property after his decease; but he even desires to transfer from himself to his wife the power of disposing of his property, in case she should die in his lifetime. That power of appointment furnishes a clue to explain
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(a) 1 *Swanst.* 201.

the inconsistency between the prior and subsequent dispositions of the will; for the testator may well have intended that the pecuniary legacies, and the gift of the residue of his real and personal estate at the decease of his wife, should take effect only in the event of her decease in the lifetime of the testator, and without having made any appointment. The scheme of the will appears to be this:—that the testator meant to give the whole of his property to his widow, subject to the legacies previously given, in case she survived him; to give her a power of disposing of his property, even if she did not survive him; and in case she should not survive him, nor exercise the power he meant to give her, then to dispose of his property in favour of other persons. That construction would be consistent with the testator's general intention, and such particular provisions as are inconsistent with the general intention may be rejected: *Boon v. Cornforth*. (a) The words, “I *further* order and direct,” after the absolute gift of all his property to his wife, shew that the subsequent provisions were subject to the previous disposition, and that there was no intention on the part of the testator to alter the disposition he had previously made, unless his wife should die before him without exercising the power of appointment. The word *further* implies a confirmation of the previous direction, and is inconsistent with the supposition of any change or fluctuation of intention.

The rule relied upon, that, in cases of repugnancy between the prior and latter parts of an instrument, the prior part of a deed and the latter part of a will is to prevail, has no foundation in reason, nor has it ever been acted upon in the case of a will, where the intention of the

1883.

 SHERRATT
 v.
 BENTLEY.

(a) 2 Ves. sen. 277.

1833.
 SHERBATT
 v.
 BENTLEY.

the testator could be collected by the application of more rational principles of construction. In *Doe dem. Leicester v. Biggs* (a), the Court, it is true, acted upon that rule, but with great reluctance; and because, as Sir *James Mansfield* observed, it was forced to put a construction upon the will in conformity with that rule, for want of a better reason. Wherever a reason can be found for reconciling clauses apparently inconsistent, the rule is disregarded. Thus in *Doe dem. Cotton v. Stenlake* (b), where the testator devised an estate to his daughter and her heirs during their lives, the latter words *during their lives* were rejected, though the daughter had three children living at the testator's death, and the testator might have intended "children" by the word "heirs." But two of these children only were living at the date of the will; and, as the after-born child could not have taken as a joint tenant for life with the other two children, the Court decided that the prior part of the will must prevail. The reason, therefore, and not the order of the testator's expressions, is the true test by which his intentions are to be tried. So in *Smith v. Pylus* (c), the concluding words in a will were rejected as repugnant to the intention indicated by a previous disposition.

Mr. *Treslove*, for the Defendant *Slater*, the legatee of the 400*l*.

Mr. *Bickersteth*, in reply.

Dec. 21. *The MASTER of the ROLLS.*

In this most inaccurate will it is impossible to give effect to every expression used by the testator, several
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(a) 2 *Taunt.* 109.

(b) 12 *East*, 515.

(c) 9 *Ves.* 566.

of those expressions being necessarily inconsistent with each other. There are, however, two principles of construction upon which it appears to me that a Court may come to a conclusion without the necessity, which, if possible, is always to be avoided, of declaring the will void for uncertainty. First, if the general intention of the testator can be collected upon the whole will, particular terms used which are inconsistent with that intention may be rejected, as introduced by mistake or ignorance, on the part of the testator, as to the force of the words used; secondly, where the latter part of the will is inconsistent with a prior part, the latter part of the will must prevail.

The testator begins his will by directing that his just debts, and a legacy given to his sister by his father's will, should be paid. He then gives a sum of 400*l.* to *Henrietta Slater* for her life, and after her death to her lawful children when they shall severally attain the age of twenty-one years; and in case *Henrietta Slater* should die without leaving lawful issue, he then gives the same sum of 400*l.* to his wife *Margaret Harrison*, to dispose of the same as she shall think proper. He next proceeds to give the whole of his real and personal estate whatsoever, and wheresoever, and of what nature or kind soever, unto his said wife, her heirs, executors, administrators, and assigns for ever; and then directs that the legatees before mentioned, by whom must be intended *Henrietta Slater* and her children, shall not be entitled to the whole or any part of the legacies until the full term of twelve months after the death of his wife.

The will, thus far, therefore, is not altogether consistent. It cannot be consistent that the wife, her heirs, executors, administrators, and assigns, shall take
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the whole real and personal estate, and that twelve months after her death the legatees shall take this sum of 400*l.* from the same property.

The will then provides that, if the wife shall happen to die in her husband's lifetime, and the before mentioned devises and bequests to her thereby lapse, the estate and effects of the testator, as well real as personal, shall go to his brother-in-law, *William Sherratt*, his heirs, executors, administrators, and assigns, upon trust for such persons and for such estates and interests as the testator's said wife in her lifetime, by any writing under her hand, shall direct. The testator then further gives, devises, and bequeaths unto certain persons therein described the rest, residue, and remainder of his real and personal estate of what kind and sort soever, and where-soever, to be equally divided amongst them, share and share alike, after the decease of his said wife.

The wife having survived the testator, the gift to her in case she died before him is now out of the question, except in so far as it may be used to evidence the intention of the testator. It is argued that the subsequent pecuniary legacies, and the gift of the rest and residue of the testator's real and personal estate after the wife's decease are to be understood as applying only to the case of the wife dying in the lifetime of the husband and making no appointment; and that the construction is to be the same as if these latter provisions had been prefaced by such a declaration. But it must be observed, that if the Court could in any case go to such a length, it would not be warranted in so doing in the present instance, because the gifts are to take effect immediately upon the wife's decease, and not upon the decease of the wife in the event of her surviving her husband.

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Although the terms of the first gift to the wife would give her the whole real and personal estate, it appears to me that it is to be intended that the testator did not understand the force of the words used; that his general intention was to give to the wife the full enjoyment of all his property during her life, and to give it over to the persons named in the latter part of his will after her decease. To give effect to that general intention, I reject the words "heirs, executors, administrators, and assigns for ever," as used by the testator without full knowledge of their force; and I call in aid the second rule to which I have referred, that, if there be doubts as to the general intention, the latter part of a will shall prevail against inconsistent expressions in the prior part of it.

1833.
SHERBATT
v.
BENTLEY.

Against this decision the Defendant *Bentley* having presented an appeal to the Lord Chancellor, the case was again fully argued by Mr. *Tinney* and Mr. *Richards* for the appellant, by Mr. *Rolfe* and Mr. *Jacob* for the devisees over, by Mr. *Dixon* for the next of kin, and by Mr. *Wright* for the heir at law. It is unnecessary to report the arguments, as they were in substance the same with those urged in the Court below, and no additional authorities were cited.

1834.
Nov. 5, 6, 7.

The LORD CHANCELLOR, after stating the material parts of the will, proceeded as follows:—

Nov. 7.

The question which immediately presents itself is this. Could the testator, who thus explicitly gives six legacies amounting to 1200*l.*, describing in detail how they shall vest, some absolutely and some for life, and in one case excluding a particular individual (*J. Sherbatt*), from the remainder expectant upon the life interest first

1834.

 SEPPARATT
 v.
 BENTLEY

first given, and who then gives the whole residue of his estate real as well as personal in the most express terms to a particular class of persons, have intended, by the devise in the first part of the will, to give all his estates real and personal to his wife absolutely? The same thing is given twice, and to different persons, and the two gifts would be quite inconsistent and repugnant, if the words which close the second gift, "after the decease of *Margaret Harrison*," were rejected.

Such at least is the plain and obvious construction of the concluding series of bequests; although it is argued, that, but for the words last cited, the whole may be brought under the clause providing for a lapse, and may be read as provisions applicable to the event of the wife predeceasing the testator, without executing the singular power of appointment given to prevent a lapse. I think that this is a very forced interpretation. Nothing can be less natural than the meaning imposed upon the word "further," in order to serve the purpose of this argument. It is supposed that by this word the testator meant, "in pursuance of this last-mentioned design," or "for default of such appointment;" whereas nothing is more ordinary than the use of the word very much in the sense of a connecting particle, a mark of continuing, or rather additional purpose or intention; and the plain meaning of it as here employed is, "in the next place," or "moreover," or "to proceed."

It appears clear to me, upon the whole, that if this series of bequests, including the gift of the residue, had stood alone without the last words "after *Margaret Harrison's* death," the sound construction would have been to hold the second clause a revocation of the first, to which it would plainly have been repugnant, as a gift

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to *A.* of the same thing which had before been given to *B.*; and thus, after giving the several legatees their legacies, the residue would have gone to the residuary legatees, and the wife have been excluded altogether.

1834.

 SHERRATT
 v.
 BERTLEY.

The rule has often been cited, though very seldom made the ground of judicial determination, which requires us to give effect to the last of two repugnant clauses in a will, though in a deed the first shall prevail. It is indeed as old as the time of Lord *Coke*, who states it in the first Institute (*a*); and it is curious to observe how he deduces it from the text. *Littleton* (*b*) simply says, "that if a man at divers times make divers testaments and divers devises, &c. the last devise and will shall stand." His learned and subtle commentator educes from the &c. this further meaning; "Here, by &c., is to be understood also that in one will where there be divers devises of one thing, the last devise taketh place; *cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est.*" But subsequent authority has, though by no means uniformly, adopted this principle. Some have held that both of the repugnant gifts are void; and Mr. *Buller*, in his note (*c*), says, the better opinion is, that each devisee takes a moiety. I think, however, that the weight of authority is the other way; and I feel bound to say that the law is otherwise, and that Lord *Coke's* doctrine is the sound one; and I do so in deference to the weight of authority, and not to the reason of the rule. For, besides the inconvenience of so severing the parts of one instrument as to set the latter against the former instead of construing the whole together (which would lead either to giving effect to both

(*a*) *Co. Litt.* 112. *b*.

(*c*) *Co. Litt.* 112. *b*. n. 1.

(*b*) s. 168.

1834.

 SHERRATT
 v.
 BENTLEY.

both or to neither), the refinement seems sufficiently puerile which introduces this rule of construction in the case of wills, merely because of the maxim *voluntas est ambulatoria usque ad mortem*; whereas ample effect would be given to the principle, if the whole will were considered as one act instead of being separated into parts, an earlier and a later. Besides, there is manifest inconsistency in this doctrine; for if the last expression of all is to prevail, wherever the will is executed by signing and publication, necessarily the last act of all, the latest expression of intention is the execution, and this refers to the earlier as well as to the later clauses, and recalls them into existence, if they had been destroyed by those later clauses.

Such appears to be the reasonable view of the subject, and it would lead either to the opinion of those who have held that both clauses are destroyed, or to that which considers both devisees to take equally, on the sounder principle of giving effect as far as possible to the whole instrument. The weight of authority, however, is against this opinion.

Ulrich v. Litchfield (a) is a case reported in a very slovenly way; but it appears that Lord *Hardwicke*, so far as his opinion can be gathered from it, inclined to the rule laid down by Lord *Coke*, and dissented from the opinion of *Plowden* and from the case of *Paramour v. Yardley*. (b) But in *Ridout v. Pain* (c), which was decided five years afterwards, Lord *Hardwicke* puts the case of a devise to *A.* and his heirs of a farm in *Dale*, and in a subsequent part of the will a devise of the same to *B.* and his heirs, and says that “though the old books

(a) 2 *Atk.* 372.

(b) *Plowd.* 539.

(c) 3 *Atk.* 486.

books held this to be a revocation, yet latterly it has been construed either a joint tenancy, or tenancy in common, according to the limitation."

1834.
SHERATT
&
BENTLEY.

Were it not for the opinion expressed by Lord *Hardwicke* upon the import of the cases, I should have said that these decisions do not materially depart from or conflict with Lord *Coke's* rule; for he evidently contemplates devises irreconcilably repugnant, and which in no way of reading them can stand together; and where the authorities have held the two devisees to take jointly or in common there was no irreconcilability, repugnancy, or necessary revocation of the one by the other. I incline to think that the *Touchstone* takes the same view of the matter (a), as the learned editor Mr. *Preston* certainly does in his edition of that valuable publication. But I speak with much distrust of my own view of the subject, when I find that the point struck Lord *Hardwicke* in a different light.

In *Wykham v. Wykham* (b), Lord *Eldon* considers Lord *Hardwicke* as having decided *Coryton v. Helyar* (which had not then been published by Mr. *Cox*) on what his Lordship calls the doctrine prevailing in all times as to wills, that a subsequent limitation inconsistent with a former one cuts down the former by a necessary implication. But in *Coryton v. Helyar* (c), Lord *Hardwicke* supplied the words, in the gift of a term of 99 years, "if he should so long live;" so that it should seem the case was one of construction and not of revocation. I nevertheless must regard this expression of Lord *Eldon* as lending the sanction of his authority to the doctrine he refers to in *Wykham v. Wykham*.

Lord

(a) p. 451.

(b) 18 Ves. 395.

(c) 2 Cox, 540.

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Lord *Alvanley* had occasion more than once to consider this subject. In *Sims v. Doughty* (a), he says that where two parts of a will are perfectly irreconcilable, so that they cannot be made to stand together by rejecting words in either part as inserted by plain mistake, he knows of no rule but by taking the subsequent words as an indication of a subsequent intention, and he adds "the Court is in a dilemma and cannot act at all unless they do that." Again in the last case which this learned and laborious Judge decided, *Constantine v. Constantine* (b), he refers to the opinion just cited, and says that he adheres to it, admitting however that where the same thing has been given to two persons in different parts of a will, doubts have been entertained whether they should not both take as joint-tenants.

But in *Doe dem. Leicester v. Biggs* (c), the doctrine was carried farther than I am aware of its having been carried in any other case. The question there arose upon the construction of repugnant words in the same clause; and it was whether a devise to *A.* in trust to pay unto or to permit and suffer *B.* to receive the rents and profits was a trust, or a use executed in *B.*; and Chief Justice *Mansfield* delivered the judgment of the Court after time taken to consider. The Court, consisting of three most eminent common lawyers besides the Chief Justice, viz. *Heath*, *Lawrence*, and *Chambre* Justices, held "the use executed in *B.*, and expressly upon the ground of the general rule that, if there be a repugnancy, the first words in a deed and the last in a will shall prevail." The Chief Justice added that "for want of a better reason the Court was forced to give the beneficial with the legal estate," and he prefaced his judgment by observing that "the case might be argued and considered for

(a) 5 Ves. 245.

(b) 6 Ves. 100.

(c) 2 Tadm. 109.

for ever without advancing it at all in law, reason, or precedent." But these observations most probably referred to the peculiarity which marked the case of the repugnant words being parts of the self-same gift. Had the irreconcilable opposition been between different clauses separated by a considerable interval, there cannot be a doubt that the Court would have applied the rule without any hesitation.

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It must then be admitted that the great weight of authority, both of Lord Coke and of the modern decisions, is in favour of regarding a subsequent gift in a will as revoking a prior one to which it is repugnant, and not rendering it all void for uncertainty. How far that repugnancy could be got rid of by presuming an intention to give each legatee an equal moiety, where the very same thing is given first to one and then to another, there being no expressions excluding such intention, might be a different question. The repugnancy, which existed in those other cases, may be said not to arise here. If in one part of a will an estate is given to A., and afterwards the testator gives the same estate to B., adding words of exclusion, as "not to A.," the repugnance would be complete, and the rule would apply. But if the same thing be given first to A. and then to B., unless it be some indivisible chattel, as in the case which Lord Hardwicke puts in *Ulrich v. Litchfield*, the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule as laid down by Lord Coke, and recognized by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety; though, had the second

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gift been in a subsequent will, it would, I apprehend, work a revocation.

It is, however, the less necessary to consider how far this joint estate may be thus implied, as it is also unnecessary to consider the admissibility of the construction put by the appellant upon the latter series of bequests, supposing that series had stood alone, and in opposition to the preceding gift to the wife; because words are added which appear to call for another construction altogether—a construction not revoking the preceding gift, but only cutting it down to a life estate. The residue is given absolutely to *W. Allen* and *J. Sherratt's* children, “after the decease of *Margaret Harrison*.” Therefore it is to be considered, first, that this is wholly incompatible with the argument of the appellant, which treats all the latter bequests, including the residuary clause, as conditional upon the event of *Margaret Harrison* predeceasing the testator, and not executing the power; and, secondly, that the latter gift of the residue both excludes the possibility of *Margaret Harrison* taking an absolute interest, and assumes that she takes another interest, viz., an interest for life. The testator first gives her the fee simple immediately on his own decease. He afterwards gives that fee simple to others, not immediately on his own death, but in remainder expectant on the determination of *Margaret Harrison's* life. Either, therefore, he had changed his intention, and was minded to give her a life estate instead of the fee he had at first given her, or he was ignorant of the force of the words he had originally used; and those words must be rejected as having been used by mistake. The former alternative is the one to which the rule sanctioned by modern decisions, as well as by Lord *Coke's* opinion, leads. The latter is the inference drawn, not unfairly, from

from the whole instrument taken together. For if probabilities are to be weighed, it is much more likely that the testator did not well understand the force of the words he used in giving the residue to the wife, than that he was ignorant that he was giving to *W. Allen* and *J. Sherratt's* children an interest which should only take effect after his wife's decease—the period he expressly fixes. His wife's life interest seems more than once to have been distinctly in his contemplation in the course of the will; for he declares that the legacies first given shall not take effect till a year after her death. Either supposition, however, will suffice to support the conclusion, which I adopt, that she only took a life interest.

The decree must be affirmed, but without costs.

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Special injunction granted, under the circumstances, to stay process of outlawry, and all further proceedings at law against the Plaintiff in equity, the Court requiring the Plaintiff to give judgment in the action, with stay of execution, to be dealt with as the Court should thereafter direct.

DRUMMOND v. PIGOU.

A MOTION was made for an injunction to restrain the Defendant *Pigou* from further proceeding in an action at law, commenced by him against the Plaintiff in the Court of Common Pleas, and from further prosecuting process of outlawry instituted by him against the Plaintiff.

The Defendant *Pigou* was the personal representative of the mortgagee of certain fee-farm rents, which had been mortgaged by *Drummond* in the year 1826. In 1829, *Drummond* entered into a treaty for the sale of the mortgaged premises to the mortgagee for the sum of 3000*l.*, no part of the principal or interest being at that time paid. The contract was not completed in the year 1834; and the Defendant *Pigou* having, in the mean time, received rents to the amount of 500*l.*, and a dispute having arisen between the parties as to *Pigou's* right to receive this money, or whether he had received it in the character of mortgagee or purchaser, *Drummond* arrested *Pigou* for the 500*l.*; and *Pigou*, having discovered that *Drummond* was residing in the *Netherlands*, commenced an action against him in May 1834, for the mortgage-money and interest, and was proceeding with process of outlawry against him for non-appearance, no previous communication having been made by him to the Plaintiff or his solicitor.

Drummond filed his bill for the specific performance of the contract for sale of the mortgaged premises, and for an injunction to restrain the Defendant *Pigou* from proceeding in the process of outlawry. The common injunction

injunction had not been obtained; and it appeared that the Plaintiff's solicitor was aware, on the 10th of July, of the process of outlawry having been issued; the last Seal-day previous to the vacation being the 28th of July. The *capias utlagatum* was issuable on the 6th of November. An *ex parte* application for a special injunction, made during the vacation, had been refused. Mr. Pemberton and Mr. K. Parker, in support of the motion.

It is not denied that there is a subsisting contract; and, as the Plaintiff claims, by his bill, the specific performance of that contract, the Defendant will not be permitted to continue proceedings at law in respect of the subject-matter of the suit. The general rule, upon which the Court acts in refusing special injunctions to stay proceedings at law, does not apply to cases where the common injunction would be obtained too late to answer any useful purpose: *Hine v. Fiddes* (a), *Jones v. Bassett* (b), *Bevan v. Reid*. (c) The Plaintiff had, here, no notice of the proceedings, and no time to obtain the common injunction for any beneficial purpose. Moreover the process of outlawry is not a proceeding at law to which the common injunction is applicable. Proceedings at law already commenced, to the restraint of which the common injunction is applicable, must be proceedings founded upon a declaration in an action by which the plaintiff at law seeks to obtain judgment and execution. The process of outlawry is not a proceeding of that description, but a proceeding for a contempt of the king's writ, in which, after the issuing of the writ, no service of process is necessary; which is entirely *ex parte*, and the object of which is, not to obtain judgment

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P. 169.

and the Court
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November. An
ex parte application
for a special
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during the
vacation, had
been refused.

(a) 2 Sim. & Stu. 376. (b) 2 Russ. 403. (c) *Ibid.*

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ment upon the merits of a cause, but to harass the defendant, and obtain a forfeiture of his goods to the Crown.

Mr. Bickersteth and Mr. Stuart, contra.

The Defendant *Pigou* is entitled, as mortgagee, to all his remedies; and has consequently a right, notwithstanding the treaty for the purchase of the mortgaged property, to proceed at law for the recovery of the mortgage debt and interest. The cases of exception to the rule for refusing a special injunction to restrain proceedings at law, are where the defendant at law has given a warrant of attorney to confess judgment, and there is an equitable ground for restraining the plaintiff from proceeding to execution; or where the proceedings in the court where the action is brought are so rapid—as in the court of the Duchy of *Lancaster*, and formerly in the *Welsh* courts—that the common injunction, regard being had to the time at which alone it can be obtained, would be useless. All the cases cited on the other side are of the latter description; and no instance can be produced of an injunction granted, upon a special application, to restrain proceedings at law in the courts at *Westminster*. The process of outlawry was resorted to in order to compel the Defendant to appear, and (by the modern practice) to put in bail. The necessity of putting in bail upon appearance was probably the cause of the Defendant's resistance to the writ. But, whatever was the cause of his resistance, he is in contempt, and consequently in no condition to call for the special interference of a court of equity. There is no pretence for the suggestion that *Drummond* was taken by surprise; for eighteen days elapsed between the time when it is admitted that his solicitor had notice of the proceedings, and the last Seal-day on which the common injunction might have been obtained.

Mr.

Mr. *Pemberton*, in reply.

The MASTER of the ROLLS. (a)

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I did not entertain the application made in the vacation, because, as no step could be taken on the other side until *Michaelmas* term, no prejudice could accrue, in the mean time, to the Plaintiff; and because, although there is authority in the books for departing from the ordinary rule against granting injunctions specially to stay proceedings at law, that rule has been departed from only to the extent necessary to give to the party, under special circumstances, the benefit from which the ordinary practice of the Court excludes him; and the Court does not go to the extent of favouring *ex parte* applications for such special injunctions.

The question here is, whether, under the circumstances, it is competent to the Plaintiff to apply specially for an injunction to restrain the proceedings at law, the common injunction not having been obtained. It is clear that the Court has jurisdiction to entertain such applications, where the party cannot, from special circumstances, obtain the benefit of the common injunction. If, for instance, the court in which the action is brought has a practice which renders it impossible for the defendant at law to obtain the benefit of the common injunction, or if the parties have placed themselves in a situation which prevents the plaintiff in equity from availing himself of the ordinary remedy, as where a warrant of attorney has been given, the Court will entertain a special application for an injunction. There is no want of jurisdiction, therefore, where, in any particular case, a party can bring himself within the exceptions

(a) Sir C. Perys.

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exceptions which will justify the Court in departing from the ordinary rule.

In the present case there has been a great deal of unfortunate hostility between the parties, and the Court can neither approve, on the one hand, of the action brought by the Plaintiff for the 500*l.*, nor, on the other hand, of the advantage taken of the known absence of the Plaintiff by the Defendant, to proceed to process of outlawry against him without any previous communication to the Plaintiff or his solicitor. As to the question whether the Plaintiff had notice of the proceedings at law in time to enable him to take the benefit of the common injunction for want of answer, I am of opinion, looking to the affidavits on both sides, that the Plaintiff had not under the circumstances an opportunity of obtaining the common injunction. It is to be observed, moreover, that these proceedings are not ordinary proceedings at law, but proceedings in outlawry, in which no notice of process is served upon the Defendant at law. This Court, therefore, has clearly jurisdiction upon special motion to restrain the Defendant *Pigou* by injunction.

The Defendant, as mortgagee, is undoubtedly entitled to all his remedies, and among these to his remedy by action for the recovery of the mortgage debt and interest; but it is admitted that there is a subsisting contract which, if carried into effect, will convert the mortgagee into a purchaser. Whether the parties stand in the relation of vendor and purchaser is a question to be determined by this Court in the suit for specific performance of the contract. That suit gives the Court jurisdiction over the whole matter, and the Court will not permit the Defendant to continue proceedings at law respecting
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the subject of the suit. If the Court shall be of opinion that the contract ought to be carried into effect, the sum of 500*l.* will be in the right hands; if it shall turn out, whether from defect of title or for any other reason, that the contract ought not to be carried into effect, the Defendant will be remitted to his character of mortgagee, and will have a right to receive his mortgage-money and interest. In the present state of the cause, the right order will be to restrain the proceedings in outlawry, upon the Plaintiff in equity giving judgment in the action for the amount of the mortgage-money and interest with stay of execution, such judgment to be dealt with as the Court shall hereafter direct.

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MASSEY v. PARKER.

A testatrix gave the interest of her residuary property to her two grand-daughters, who were both unmarried at the date of the will; and she directed that the interest should be for and under their sole control, the principal to be equally divided for the use of their surviving issue, and that *M. W.*, their mother, should have no control whatever over it. One of the grand-daughters, *E. W.*, married after the death of the testatrix, and her husband became insolvent:

Held, that the words of

the will did not indicate an intention to exclude the marital control, and that the legacy to *E. W.* passed to her insolvent husband's assignee.

Seemle, that, if the words had indicated an intention to give the interest of the property to the separate use of the grand-daughters, the legacy would still have passed to the assignee of the insolvent husband; for a gift to the separate use of an unmarried woman will not restrict her right of disposing, in any manner, of the property given, and consequently of giving it, if she think fit, by the act of marriage, to her husband.

A PART of the will of *Elizabeth Wadsworth*, dated the 8th of *February* 1829, was in the following words:—

“ And, secondly, it is my will that my two grand-daughters *Eliza* and *Rebecca Wadsworth* receive the full interest of all monies not otherwise bequeathed that I may die in possession of; and it is my will, that the said interest be for and under the sole control of my said two grand-daughters, the aforesaid *Eliza* and *Rebecca Wadsworth*, the principal to be equally divided for the use of the surviving issue; *but if either*, and that *Mary Wadsworth* their mother shall have no control whatever over this their property, and at the demise of the said *Eliza* and *Rebecca Wadsworth*, the principal to be equally divided for the use of their surviving issue; but if either one of my grand-daughters die without issue, her share of the property returns to the surviving grand-daughter, and if both should die without issue, the property must return to my niece *Eliza Lucas*, the wife of *Charles Lucas Lucas* of *Winchester*. In case of her death, I will it to be divided equally amongst her children. I give and bequeath to *Eliza Lucas*, the wife of *Charles Lucas Lucas* of *Winchester*, the sum of 20*l.* a year for her own use.”

The

The testatrix died in *June* 1829, leaving her two grand-daughters named in the will, *Eliza* and *Rebecca Wadsworth*, surviving her. *Eliza* was of age; but *Rebecca Wadsworth* was an infant and unmarried at the date of the will, and at the death of the testatrix. In the month of *December* in the same year, *Eliza Wadsworth* married *Jedediah Wood*; and there were two children, issue of the marriage. In *August* 1833, *Wood* took the benefit of the insolvent debtors' act; and the Plaintiff *Massey* was chosen assignee of his estate and effects.

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The bill was filed against the executors, by whom the will was proved, and other parties claiming interests under the will. To this bill the Defendants demurred; and the questions raised upon the argument of the demurrer were, first, whether, upon the words of the will, the testatrix intended to give the interest of her residuary personal estate to her grand-daughters to their separate use; and, secondly, whether, if such were her intention, it was an intention to which the law would permit effect to be given.

Mr. *Spence*, in support of the demurrer.

The intention of this testatrix to give to her grand-daughters a separate estate in the interest of her residuary property is plainly to be collected from the context of the will, and there are apt technical words to give effect to that intention. The testatrix had evidently two species of control in her contemplation—the control of the husbands with whom her grand-daughters might intermarry, and the control which might be exercised over her grand-daughters by their mother. Against the marital control she provides by directing that the income of the fund shall be “under the

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the sole control" of her grand-daughters, and that the principal shall go to their issue; and she then commences a sentence with the words "but if either," intending to provide for the events of the decease of one or both of her grand-daughters without issue. It then occurs to her that there was another species of control to which her grand-daughters, until their marriage, would naturally be subject, namely, the control of their mother; and, having provided against the mother's interference with the interest of her residuary property, she again takes up the subject from which this second and distinct object had diverted her attention, and, beginning with the same words "but if either," she proceeds to provide for the event of a failure of issue. That the marital control was the first species of control present to her mind, and against which she intended to provide, is evident from the circumstance of her making a provision in the same sentence for the children of her then unmarried grand-daughters, one of whom, it must be observed, was an infant at the date of the will.

With respect to the sufficiency of the words used by the testatrix to effect her intention, it is clear, upon the authorities, that the words "under the sole control" will give a separate estate. In *Ex parte Ray* (a), Sir Thomas Plumer says, "Taking the words 'sole use' by themselves, they must have the same meaning as 'separate use;' omitting the word *sole*, the property would go to the husband; but I am not at liberty to reject that word. 'Sole' means solely hers—for her sole benefit. It is an emphatic and operative word." Here then the testatrix has used that emphatic and operative word; if she had omitted to use it, the property would have

(a) 1 *Mad.* 199.

have gone to the husband, but as she *has* used it, she has effectually excluded all right of the husband, or of his assignee to the property so bequeathed. In *Prichard v. Anes* (a), a separate estate was held to be given to a married woman under the words, "for her own use and at her own disposal;" expressions less strong than in the present case, for the emphatic word *sole* was there wanting.

If an attempt should be made to distinguish between the cases of married and unmarried women, *Adamson v. Armitage* (b); and *— v. Igno* (c), are conclusive authorities to shew that there is no ground for such a distinction. In *Adamson v. Armitage* the gift was, "for the sole use and benefit" of the testator's female servant, who appears from the argument in the case to have been a single woman; and in *— v. Igno* the bequest was for the sole use and benefit of the testator's widow, who must, of necessity, have been a single woman when the gift took effect; and in both these cases the words used by the testators were held to vest the property in the legatees exclusive of the right of a future husband.

Mr. Pemberton and Mr. Kindersley, contra.

The first question is, whether the words used by the testatrix are sufficient to indicate an intention to give the income arising from her residuary property to the separate use of her grand-daughters; but the more general, and by far the more important question raised upon this demurrer is, whether, supposing that intention to have been unequivocally expressed, it is such an intention

(a) 1 *Turn. & Russ.* 222.

(c) 1 *Younge*, 562.

(b) 19 *Ves.* 416. *Coop.* 283.

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intention as the law will permit to be operative in the case of an unmarried woman.

As to the first point, it is settled that a gift to a woman cannot take effect as a gift to her separate use, unless the will affords evidence of the clear unequivocal intention of the testator to exclude the marital right; *Brown v. Clark* (a), *Rich v. Cockell* (b), *Wills v. Sayers* (c), *Roberts v. Spicer*. (d) If there is any ambiguity on the face of the will as to the intention of the testator to exclude the marital control, the husband cannot be deprived of his legal right. Can it be pretended that there is no such ambiguity in this case? Looking to the language of the will, without reference to the circumstances of the testatrix's family, which, if they could be used for that purpose, would strongly support the argument, is not all the probability in favour of the inference, that the testatrix intended to exclude, not the marital control, but the influence of the mother? It is sufficient that the intention be doubtful, for the purpose of sustaining the claim of the Plaintiff; but, even if that intention were unequivocally expressed, this demurrer must be over-ruled.

It may now be considered as settled upon principle and upon the authority of decided cases, that the law will no more permit a person to make a gift and impose restrictions upon the donee's power of disposing of the gift, where an unmarried woman is the donee, than in the case of a male. A single woman has exactly the same rights in this respect as a man; and a gift to her separate use is, to all legal intents and purposes, an absolute gift, the words "to her separate use" being wholly inoperative.

Separate

(a) 3 Ves. 166.

(b) 9 Ves. 369.

(c) 4 Mad. 409.

(d) 5 Mad. 491.

Separate property is the creature of a court of equity; it can exist only in a state of coverture; and in *Barton v. Briscoe* (a), it was determined that, when the married woman becomes discovert, she has the same power over her property as other persons. From that decision it followed as a necessary consequence, that when the fetter, which had once existed, was removed, it could not again attach; and that principle being admitted, the next subject of investigation naturally was, whether any restraint upon alienation, in case of future coverture, could be valid. If a married woman, upon becoming *sui juris*, were emancipated, why should a single woman, who was equally *sui juris* in respect of the property vested in her, ever be fettered? Restraints upon alienation, in case of future coverture, had long existed, and still continued to exist, in the forms of conveyances; but it was obvious that they could not bear investigation; and accordingly, in *Woodmeston v. Walker* (b), where this subject was, upon an appeal from a decision of the late Master of the Rolls, very fully discussed, it was decided by Lord Chancellor Brougham, that a gift to the separate use of a woman who was unmarried at the date of the will and at the death of the testator gave the legatee an absolute interest, and that a clause restraining her from disposing of the gift by anticipation was inoperative. *Stanton v. Hall* (c), *Tyler v. Lake* (d), *Brown v. Pocock* (e), *Newton v. Reid* (g), are all authorities illustrating and confirming this doctrine.

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As to the case of *Adamson v. Armitage*, it is by no means clear that *Lydia Adamson* was an unmarried woman;

(a) *Jac.* 603.

(b) 2 *Russ. & Mylne*, 197.

(c) 2 *Russ. & Mylne*, 175.

(d) 4 *Sim.* 144. 2 *Russ. & Mylne*, 183.

(e) 2 *Russ. & Mylne*, 210.; and see p. 189. *infra*, where will be found Sir John Leach's own note of this case.

(g) 4 *Sim.* 141.

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woman; she might, for any thing that appears to the contrary, have been a married woman, and her husband might have been a party to the suit. But supposing her to have been an unmarried woman, the Court was not, in that case, called upon to determine whether she took any interest under the will exclusive of the rights of any future husband, but whether the gift of the interest of the fund for her sole use and benefit cut down a previous absolute gift of the principal. The decree, moreover, in *Adamson v. Armitage*, declaring the plaintiff to be absolutely entitled to the fund, is inconsistent with the supposed exclusion of the control of any future husband. It was competent to her, undoubtedly, if she afterwards married, to withdraw her money by a settlement from the marital control; but it was also competent to her to give it, if she thought fit, to her husband; as it was, indeed, to exercise any other act of ownership over her property.

But, whatever doubt there may be as to the donee being married or unmarried in the case of *Adamson v. Armitage*, in ——— v. *Lyne* it is said the legatee must have been single; for there the gift was to the testator's widow. That is so short a note, that it cannot be relied upon as an authority against the cases in which this subject has been deliberately considered. The name of the plaintiff is wanting; it does not appear what character the parties filled, nor what was the object of the suit; there is no argument; and the case, in fact, amounts only to a *dictum* of Lord *Lyndhurst*, that some effect must, if possible, be given to words used by a testator,—a proposition too clear to be denied, but which is open to this observation, that if the only effect which can be given to words used by a testator, is inconsistent with a rule or principle of law, such words must be inoperative.

Mr.

Mr. Spence, in reply.

*The MASTER of the ROLLS.**

Two questions are raised by this demurrer: first, whether the testatrix has by her will given the income of the fund in question to the separate use of her grand-daughter *Eliza*; and, secondly, whether, if she intended so to do, such intention is now to be carried into effect. The bill, after setting out the will, states that the testatrix died in *June* 1829; and that in *December* 1829 the grand-daughter *Eliza* married one *Wood*, whose assignee the Plaintiff is, and in whose right, as husband of *Eliza* the grand-daughter, he now claims the interest of the fund.

The question is, whether such statement shews any interest in *Wood* the husband. It is not material to say much upon the first point, but I am of opinion that the will does not give the interest to *Eliza* separate from the husband. The cases require very distinct and unequivocal expressions, to create a separate interest in the wife. In *Tyler v. Lake* (a), the Lord Chancellor says that the husband is not to be excluded except by words which leave no doubt of the intention; and of the principle that case of *Tyler v. Lake*, which is also reported before the Vice-Chancellor (b), and the case of *Stanton v. Hall* (c), afford strong illustration. In neither of these cases did the claim of the wife prevail; although in *Stanton v. Hall* the whole machinery of the instrument proved that such must have been the intention, but the required words of exclusion were wanting; and in *Tyler v. Lake* the trustees were directed to pay the shares of the trust fund into the proper hands of the married women, to and

* Sir C. Pepys.

(a) 2 Russ. & Mylne, 183.

(c) 2 Russ. & Mylne, 175.

(b) 4 Sim. 144.

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and for their own use and benefit; and if they should be dead, to pay the same to their husbands.

Such being the rule, is there in this case no doubt of the intention to exclude the husband? The true construction is quite the other way. There is no mention of the husbands, nor any direct allusion to marriage. There is, indeed, a gift to the children of her grandchildren, but there is nothing to shew that the testatrix had present to her mind the right which future husbands of her grandchildren would obtain in their property. It is immaterial to consider what effect the words might have had, if used with reference to future husbands of her grandchildren, because I am of opinion that they are in this case used with reference, not to any control of such future husbands of the grandchildren, but to the possible control of their mother.

But the more important question is, whether the intention to give the income for the separate use of the grand-daughter *Eliza*, if sufficiently expressed, can, under the circumstances, have effect given to it so as to deprive the husband of his ordinary right to the property? The objection is that, the legatee being unmarried at the time of the testatrix's death, the intended restriction was inconsistent with the nature of the interest given, and therefore inoperative. That an attempt so to fetter the interest of a male legatee cannot succeed, was decided in *Brandon v. Robinson* (a); and that the same rule applies to an unmarried female legatee, is established by *Woodmeston v. Walker* (b), and *Brown v. Pocock*. (c)

The only modern case, apparently inconsistent with these decisions, is that of ——— v. *Ilyne* (d); but it is to

(a) 18 Ves. 429.

(b) 2 Russ. & Mylne, 197.

(c) 2 Russ. & Mylne, 218.

(d) 1 Younge, 562.

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PARKER.

to be observed, that the judgment in that case proceeded altogether upon the supposed intention, without reference to the rule of law as established in the other cases. It has also been decided that such fetters, though binding upon a married female legatee during her coverture, cease upon her becoming discoverd. Such is the case of *Barton v. Briscoe*. (a) It may, indeed, be said, that in that case the restriction was confined to the existing coverture; but in *Jones v. Salter* (b), a subsequent marriage was in terms provided against, and yet Sir *William Grant* held that, after the death of the first husband, the legatee had the absolute power over the fund.

The only question, therefore, is, whether, where such fetters are attempted to be imposed upon an unmarried female legatee, and she marries without obtaining payment of the fund, such fetters are to operate during the coverture. Why were they inoperative before her marriage? Because they were inconsistent with the nature of her estate. Her estate and interest were, therefore, absolute before marriage; and the trustee held the legacy for her absolutely. She might have taken it herself, or have given it to any one; and why may she not, by the act of marriage, give it to her husband? Upon principle, therefore, I should not have had any doubt of the right of the husband: but the very point was decided in *Newton v. Reid* (c); and that case was alluded to, without any expression of disapprobation, by the Lord Chancellor in *Brown v. Pocock*. I must, therefore, consider the point as settled.

Upon both points, therefore, I am of opinion that *Eliza's* husband did obtain an interest in his wife's legacy, and that the demurrer must therefore be over-ruled.

(a) *Jacob*, 603. (b) 2 *Russ. & Mylne*, 308. (c) 4 *Sim.* 141.

1834.

ROT. 1. S.
May 31.

KENSINGTON v. DOLLOND.

By the marriage settlement of a widow, her property was assigned to two trustees, upon trust to invest and pay the dividends to her for her life for her own sole and separate use, and after her decease, upon trust to pay the fund to her daughter by her first husband, "for her own use and benefit." The daughter's husband, *F. H.*, who was one of the trustees of the settlement, became bankrupt: Held that, on the death of the tenant for life, the assignee of *F. H.* was entitled to the fund, subject to the wife's equity for a settlement.

By a settlement, dated the 14th of *November* 1806, and made previously to the marriage of *Harriet Elizabeth O'Hara*, widow, with *Samuel Ballard Whitaker*, between the intended husband of the first part, the intended wife of the second part, and *Francis Holland* and *George Huggins Dollond*, trustees, of the third part, reciting that *Harriet Elizabeth O'Hara* was then or might become entitled, as the widow of Captain *O'Hara*, to considerable sums of money, under a grant or grants from his Majesty or otherwise in respect of the services of her deceased husband; it was witnessed, that the said *Samuel Ballard Whitaker* and *Harriet Elizabeth O'Hara* covenanted, promised, and agreed to and for themselves, and their several and respective heirs, executors, and administrators, with the said *Francis Holland* and *George Huggins Dollond*, their executors and administrators, that all and every the sum and sums of money to which the said *Harriet Elizabeth O'Hara* was then, or to which she, or the said *Samuel Ballard Whitaker* in her right, might become entitled under any grant of money from his Majesty, and all and every other sum or sums of money and effects to which the said *Harriet Elizabeth O'Hara* or the said *Samuel Ballard Whitaker* in her right should become entitled by any other means whatsoever, should be paid, assigned, and transferred to the said trustees, upon trust to invest the same in government or real securities, and to pay the dividends thereof to the said *Harriet Elizabeth O'Hara* for and during her life, to and for her own sole and separate use,

in-

independent of, and without being subject to the control, debts, or engagements of the said *Samuel Ballard Whitaker*, and her receipt only, under her hand, from time to time to be a good discharge for the same; and after her decease, then upon trust to pay, transfer, and assign the said sum and sums of money and effects, and the stocks, funds, and securities in and upon which the same should be invested, unto *Maria Theresa Holland*, wife of the said *Francis Holland*, and daughter of the said *Harriet Elizabeth O'Hara*, her executors, administrators, and assigns, to and for her and their own use and benefit. And a power was reserved by the settlement to *Maria Theresa Holland* to appoint a new trustee in lieu of her husband *Francis Holland*, if he should die in the lifetime of her mother.

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KENSINGTON
v.
DOLLOND.

The marriage took effect; and the trustees received a sum of 1909*l.* under grants from his Majesty to *Harriet Elizabeth Whitaker*, in respect of her former husband's services; and that sum was invested according to the trusts of the settlement. Mr. *Whitaker* died soon after the marriage was solemnized; and in July 1813 *Francis Holland* became a bankrupt. Mrs. *Whitaker* died in February 1833.

The bill was filed by the assignee of the estate of *Francis Holland* against the trustees of the settlement and *Maria Theresa Holland*; and it prayed that the Plaintiff might be declared entitled to the fund given for the use and benefit of Mrs. *Holland*, subject to such settlement as the Court might think fit to direct in her favour, no settlement having been made upon her marriage with Mr. *Holland*.

Mr. *Bickersteth* and Mr. *Wood*, for the Plaintiff.

It

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v.

DOLLOND.

It is perfectly clear that the limitation of this fund to Mrs. *Holland* "for her own use and benefit," will not create a trust for her sole and separate use. The insufficiency of these words for that purpose is the more striking in this case, because the limitation to Mrs. *Holland* is preceded by another, in which proper technical words are used for the purpose of giving to Mrs. *Whitaker* a life-interest in the fund to her sole and separate use. The circumstance of the husband of Mrs. *Holland* being a trustee will, probably, be relied upon by the other side; but that can make no difference, for he is associated with the other trustee, and must be taken, therefore, to be a trustee, not for his wife alone, but for all the purposes of the settlement. In *Ex parte Beilby* (a), where there was a bequest to two trustees, one of whom was the husband, in trust for the wife for life, and after her death for the benefit of her children, Sir *John Leach* says, "With respect to the claim of the wife to be considered as entitled to this trust-fund for her separate use, because her husband was named a trustee of the fund, it is to be observed, that the husband is not the only trustee, and that the two trustees named are trustees, not for this particular fund, but for all the purposes of the will; and there is no sufficient ground, therefore, for the inference that the testator must have intended that she should take the life-interest to her separate use. What might be the inference if the husband were the sole trustee of a particular fund given to the wife for life, it is not necessary now to determine." In *Tyler v. Lake* (b), the words were stronger in favour of an intention to exclude the marital right than in the present case; for there the trustees were directed to pay the shares of two married women "into their own proper

— (a) 1 *Glyn & Jam.* 167.

(b) 4 *Sim.* 144. 2 *Russ. & Mylne*, 185.

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proper and respective hands, to and for their own use and benefit;" yet the Vice-Chancellor held, that the shares did not vest in the married women to their separate use; and that decision was affirmed, upon appeal, by the present Lord Chancellor.*

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v.
DOCKLAND.

Mr. *Pemberton* and Mr. *Hetherington*, for the wife.

In this case, one trustee was named by Mrs. *Whitaker*, and the other by Mrs. *Holland*; and there is an express provision that, if Mr. *Holland* should die in the lifetime of his wife, she should appoint a new trustee in his stead; so that, although there are two trustees in this settlement, yet, with reference to the interest of Mrs. *Holland*, her husband is the sole trustee for her own use and benefit. In *Darley v. Darley (a)*, it was held, that where an estate is given to a husband "for the livelihood of his wife," he is a trustee for her separate use; and in *Jones v. ———*, which is cited in argument in the case of *Lumb v. Milnes (b)*, a disposition to the wife for her own use, though there were no trustees, was held to be sufficient to exclude the right of the husband. It is true, that that authority has not been followed in some subsequent cases; but it is no less certain, that where a bequest is made to a husband in trust for his wife, he is a trustee for her separate use. *Tyler v. Lake* is not an authority for the Plaintiff, because there the husband was not a trustee; and *Ex parte Beilby* has no application, because, in that case, the trustee associated with the husband was plainly associated with him for all the purposes of the will.

Mr. *J. Romilly*, for the trustees.

Mr.

* Lord Brougham.

(a) 3 Atk. 399.

(b) 5 Ves. 520.

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v.
DOLLOND.Mr. *Bickersteth*, in reply.

Darley v. Darley is shewn by Lord *Alvanley* to have been incorrectly reported in *Atkyns*, the decree being directly the reverse of what it is there stated to have been; *Lee v. Prieaux*. (a) It is now settled, that the question, whether there is an intention to give a separate estate to a married woman, cannot be determined by inference; the intention must be manifested by words sufficiently definite and technical to create such an estate; and in this settlement there are no such words.

The MASTER of the ROLLS.

The intention to give a separate estate must be clearly expressed. A gift to a wife for her own use and benefit does not clearly express such an intention; nor does a gift to a husband for his wife's own use and benefit, the husband being one of the trustees of a settlement, clearly indicate such an intention; more especially, when it is considered that in this case a trust for the separate use of a married woman is clearly expressed in the preceding part of the settlement. The Court cannot infer that the same effect was intended to be given to different expressions. The Plaintiff is, therefore, entitled to the decree prayed for by his bill.

(a) 5 Bro. C. C. 581.

1832.

BROWN v. POCOCK. (a)

ROLLS.
1832.
Nov. 28.

LADY POCOCK, by her will, gave a sum of 6000*l.* upon trust for the maintenance and education of the three daughters of *James Edward Brown* until they should respectively attain the age of twenty-one, and thereafter to be paid to them during their respective lives; and in case of the marriage of either of them, then one equal third part to be invested for the sole separate and peculiar use of such daughter so marrying during her life, and the dividends and interest thereof to be paid to her accordingly, but not by way of anticipation.

A testatrix gave a legacy to a female for life, and in case she married, then to be for her sole and separate use, without power of anticipation. A grant of an annuity charged on this legacy, and made before marriage, cannot prevail against the legatee after marriage.

One of the daughters, upon attaining twenty-one, was induced by her father to grant an annuity charged upon her share in consideration of a sum of money paid to the father. This daughter soon afterwards married, and the present petition by the grantee of the annuity prayed the payment of the annuity out of the dividends of her share of the 6000*l.*

The MASTER of the ROLLS refused the prayer of the petition, stating, that the grant of the annuity could not prevail against the daughter after marriage; the plain intention of the testatrix being that, if the daughter married, the interest given for her sole and separate use should not be defeated by anticipation.

(a) Reversed on appeal; 2 *Russ. & Mylne*, 210.

1862.

ROLLS.
Nov. 8.

STUCKEY v. DREWE.

A conveyance or payment made to a creditor by a person in insolvent circumstances, upon such person's own motion, without any pressure or threat on the part of the creditor, or made colourably with a view to divert the property from other creditors, or made with a view to give a preference to a particular creditor, within three months before the imprisonment of the insolvent, is a *voluntary conveyance* or payment within the meaning of the 7 G. 4. c. 57. s. 32.

THE bill was filed by a creditor, who was also the assignee of the estate of *Thomas House*, an insolvent, and it prayed that a conveyance of a certain tenement and garden, made, or purporting to be made, in consideration of the sum of 100*l.*, by *House* to the defendant *Drewe*, might be declared voluntary within the meaning of the thirty-second section of the 7 G. 4. c. 57., and consequently fraudulent and void against the creditors of the insolvent.

The conveyance was dated the 10th of *September* 1828, and *House* was arrested and went to prison on the following 6th of *November*. There was evidence, on the part of the Defendant, to shew that *Drewe* was a creditor of the insolvent to the amount of 40*l.*, and that the difference between the purchase-money and the debt was paid by *Drewe* to the insolvent. The circumstances under which the conveyance, impeached by the Plaintiff, was made, are stated and commented upon in his Honor's judgment.

In the proceedings before the Commissioners of the Insolvent Debtors' Court, the Plaintiff had at first agreed to consent to the insolvent's discharge, and to take a reconveyance of the premises in question from the Defendant *Drewe*, on paying to him the sum of 100*l.*, the alleged purchase-money; but a further sum of 7*l.* having been demanded for costs, this arrangement was broken off, and the Commissioners discharged the insolvent unconditionally.

The

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The thirty-second section of the 7 G. 4. c. 57. is as follows: —

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v.
DARBY.

“ If any prisoner, who shall file his or her petition for his or her discharge under this act, shall, before his or her imprisonment, being in insolvent circumstance, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons, in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this act. Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over shall be so deemed fraudulent and void, unless within three months before the commencement of such imprisonment, or with the view and intention, by the party so conveying, assigning, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act.”

Mr. *Bickersteth* and Mr. *Jacob*, for the Plaintiff.

There is the strongest reason to conclude in this case, from the conduct and declarations of the insolvent, that the transaction between him and the defendant was a mere colourable sale, the real object of which was to defraud the insolvent's creditors. It is said, indeed, that a debt of 40*l.* was due from the insolvent to the Defendant; that the Defendant pressed for payment of this money, and that the debt was paid out of the sum of 100*l.*, the alleged purchase-money; but this account of the

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the transaction rests only on the evidence of a single witness, who is the brother-in-law of the insolvent, and who, in fact, acted as his agent. Both the conveyance and the alleged payment of 40*l.* were fraudulent and void, under the thirty-second section of the 7 *G.4. c. 57.*, as against the creditors of the insolvent, having been *voluntarily* made within three months before the insolvent was arrested and went to prison.

Mr. *Beames* and Mr. *Stinton*, for the Defendant.

The real sum in dispute amounted only to 7*l.*, for the Plaintiff was content, in the proceedings under the Insolvent Debtors' Act, to pay back the 100*l.* purchase money, which the Commissioners considered it just that the Defendant should receive. As to the debt of 40*l.* due from the insolvent to the Defendant, which it is sought to impeach, it is in evidence that the insolvent was pressed for the payment of that debt as early as the month of *February* 1828. The clause in the 7 *G.4. c. 57.* cannot apply to this conveyance, for the Plaintiff has in effect admitted that the Defendant was a *bonâ fide* purchaser for the whole amount of the purchase-money; and it is proved, at any rate, that the Defendant paid the difference between the purchase-money and the debt; how, then, can it be pretended that this was a voluntary conveyance?

The MASTER of the ROLLS.

The Commissioners of the Insolvent Debtors' Court appear to have discharged the insolvent, upon the notion that it was a reasonable proposition that 100*l.* should be paid by the Plaintiff in this suit, in consideration of a reconveyance of the premises in question from *Drew*. In that notion they were plainly mistaken. The sum of 100*l.* ought not to have been paid, because such a payment

ment went to admit the validity of a conveyance which gave a fraudulent preference to *Drewe*.

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 v.
 DREWE.

In order to avoid this conveyance, it must be established, first, that *House* was in insolvent circumstances at the time of executing it; and, secondly, that it was a *voluntary* conveyance. That he was in insolvent circumstances is proved beyond all doubt by the proceedings under the Insolvent Debtors' Act, even if that fact were not established by the conduct of the insolvent. The single question, therefore, is, whether this was a voluntary conveyance?

The facts of the case are these. On the application of the Plaintiff *Stuckey* for the payment of his debt, the insolvent made a proposition to pay it in three instalments; which proposition was accepted. He did not pay the first instalment, and, upon being pressed for payment, he entered into a second engagement, which he also failed to fulfil; and in fact, his solicitor, in a letter addressed to the Plaintiff, fairly admitted that *House* was unable to pay the money. At this time, on the 6th of *September*, the insolvent came up to *London* from his house in *Somersetshire*, proceeded to the residence of *Drewe*, his wife's uncle, and on the 10th of *September* executed the conveyance in question. There was no previous investigation of title, and it does not appear that any particular of the estate was furnished to *Drewe*. It is said that he made this conveyance in consequence of an antecedent pressure for a debt of 40*l.* on the part of *Drewe*; but how came it that it never occurred to the insolvent to propose this conveyance to *Stuckey*, who was a creditor to a much larger amount, and much more pressing than *Drewe*? Having executed this conveyance, he returned into the country; and it appears from the evidence of *Morris*, an auctioneer, that he made

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a colourable sale of his fixtures and farming utensils, and did not conceal his intention of getting rid of *Stuckey's* claim by going to prison, and taking the benefit of the Insolvent Debtors' Act. It is difficult, therefore, to believe that his previous journey to the residence of *Drew* was not made with the same view of defrauding the Plaintiff.

Upon the clause of the 7 G. 4. c. 57. it does not appear that there has been any decision, or that the attention of any of the Courts has hitherto been called to it. If the conveyance be made to a creditor upon the motion of the insolvent, and not in consequence of any pressure or threat on the part of the creditor, it must be considered a voluntary conveyance. If it be made colourably, and with a view to divert the property from the reach of other creditors, it is plainly a voluntary conveyance. Again, if it be made with a view to give a fraudulent preference to any creditor, it is a voluntary conveyance. Under all the circumstances of this case, I am very much inclined to doubt whether the sale to the defendant was not merely colourable. But if it was made *bonâ fide*, and was not merely colourable, I am of opinion that it proceeded altogether upon the motion of the insolvent, and that the conveyance was consequently voluntary. Upon the whole, though the amount of the sum in dispute between the parties was so small that the matter might and ought to have been settled without resort to a court of equity, yet, as that course has not been taken, the Court is bound to pronounce that this was a voluntary conveyance within the true construction of the act, and must consequently be avoided.

1833.

STURGE v. STARR.

1833.
ROLLS.
Feb. 15.

WILLIAM STARR bequeathed one sixth of the produce of his real estates to trustees, upon trust to invest the same, and pay the dividends into the hands of his daughter *Georgiana Whatford*, or of such person as she should appoint, to her separate use, and after her decease upon trust for the benefit of her children. The testator died in 1807. The ceremony of marriage was afterwards performed between *Georgiana Whatford* and a person named *Wright*, who was in fact married at the time to another woman. *Georgiana Whatford* lived with *Wright* in ignorance of the fact of his prior marriage, and received the dividends of the trust fund until the year 1816, when she and her supposed husband contracted to sell her interest in the legacy to *John Sturge* for the sum of 333*l.* 14*s.*, which sum was paid to her and *Wright*, and a deed of assignment to *Sturge*, dated the 22d of June 1816, was executed by them jointly. The bill was filed by *Sturge* against the representative of the surviving trustee of the trust fund, and *Georgiana Whatford*, for the purpose of obtaining the benefit of the assignment.

A man, already married, performed the ceremony of marriage with *G. W.*, and joined with her in executing an assignment of her life interest in a trust fund to a purchaser. The fraud practised upon *G. W.* by the person acting in the character of her husband did not affect the validity of the assignment, nor was it necessary to make the supposed husband a party to a suit instituted by the purchaser to obtain the benefit of the assignment.

On the part of the Defendants, it was contended by *Mr. Treslove* that the transaction was tainted by the fraud of one of the parties to it, and that the deed of assignment, having been obtained from a person assuming a false character, and imposing as well upon *Georgiana Whatford* as upon the Plaintiff, was not such an instrument as a court of equity would carry into execution. It was like the case of a legacy given to a

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v.
STARR.

person in a character which did not belong to him, and which he had fraudulently induced the testator to believe that he sustained. In such a case the Court adopted the rule of the civil law (a); “*falsam causam legato non obesse, verius est, quia ratio legandi legato non cohæret; sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse;*” and the legacy will fail: *Kennell v. Abbott.* (b) It was also insisted that *Wright* ought to have been made a party to the suit.

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The false character under which *Wright* acted cannot affect the validity of this transaction. The property was *Georgiana Whatford's*; and the instrument by which it was assigned was her instrument, not her supposed husband's. She might not have executed such an instrument had she been aware of the fraud that had been practised upon her by *Wright*; but that fraud could not affect the rights of a *bonâ fide* purchaser. *Wright's* participation in the execution of the instrument must be considered as nugatory. It is not necessary, therefore, that he should be a party to the suit.

(a) *Dig. Lib. 35. tit. 1. l. 72. s. 6.*

(b) 4 *Ves.* 802.

1832.

LECHMERE v. LAVIE.

ROLLS.
1832.
July 23.

THE testatrix *Ann Lavie* made a codicil to her will in the following words:—“ I hope none of my children will accuse me of partiality in having left the largest share of my property to my two eldest daughters, my sole motive for which was to enable them to keep house so long as they remain single; but in case of their marrying, I have divided it amongst all my children. If they die single, of course they will leave what they have amongst their brothers and sisters, or their children.”

Words of expectation in a will, not amounting to recommendation, will not create a trust.

The testatrix left her two eldest daughters, *Anna Maria Lavie*, and *Sarah Lavie*, two sons, and another daughter, the Plaintiff *Emilia Lechmere*, surviving her, a fourth daughter, *Frances St. John*, having died in the lifetime of the testatrix.

Anna Maria Lavie died without having been married; and, by her will, bequeathed all her property, subject to a few pecuniary legacies, to her sister *Sarah*.

Sarah Lavie also died without having been married, and having made a will, which contained the following passage:—“ The whole of the money left me by my dear mother, as well as my sister, and likewise what *Aunt Blaney* left to my sister, is all now mine, and invested in the navy 4 per cents.” *Sarah Lavie* proceeded, by her will, to dispose of her property among her relations, but otherwise without regard to the above-stated codicil to the will of her mother.

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 LECHMERE
 v.
 LAVIE.

The bill was filed by *Thomas Luther Lechmere* and *Emilia* his wife (the only surviving child of the testatrix *Ann Lavie*), and by children of deceased sons and daughters of the testatrix *Ann Lavie*, against the personal representative of *Sarah Lavie*, who was also the personal representative of *Anna Maria Lavie*, and of the testatrix *Ann Lavie*, and against other parties interested under the will of *Ann Lavie*, and the principal question in the cause was, whether the words of the codicil amounted to recommendation, so as to create a trust in the property given by the will of *Ann Lavie* to her two eldest daughters for the benefit of the brothers and sisters or their children.

For the Plaintiff it was argued, that it had been frequently determined that words, amounting to a desire or recommendation in a will, would raise a trust, and be equivalent to an express disposition: *Excles v. England* (a), *Harding v. Glyn* (b), *Malim v. Keighley*. (c) Here the words were stronger than a recommendation; for they expressed the fullest confidence, on the part of the testatrix, that the course recommended by her would be implicitly adopted. Now, words expressing the fullest confidence that a particular course would be adopted had been held to be imperative: *Wright v. Atkins*. (d) The only difficulty in such cases had been, not in determining the sufficiency of words of recommendation or of confident expectation to create a trust, but in determining the objects of the trust, where those objects were not clearly defined. In this case, the testatrix had pointed out with sufficient distinctness the persons

(a) 2 Vern. 466. Prec. Ch. 200.

(b) 1 Atk. 469.; and see *Brown v. Higgs*, 5 Ves. 501. where *Harding v. Glyn* is stated by Lord

Alvanley from the Registrar's book.

(c) 2 Ves. jun. 333., and 320.

(d) 1 Turn. & Russ. 143.

persons to whom she desired the property given to her two eldest daughters to go, in the event of those daughters dying single. By the words "amongst their brothers and sisters, or their children," the testatrix evidently contemplated an equal division of the property among such brothers and sisters as should be living at the death of the two eldest daughters respectively, and the children of such brothers and sisters, to take by representation, as should be then deceased.

1852.

 LACHMERE
 &
 LAVIS.

On the other side it was contended, that it was unnecessary to consider what effect might be given to the supposed limitation, inasmuch as no trust was created by the language of the codicil. There were three tests laid down by Lord Eldon in *Wright v. Atkyns* (a), for the purpose of trying whether a trust was created by means of an obligation imposed upon the conscience of a legatee; the words must be imperative, the subject must be certain, and the object as certain as the subject. Would the present case bear the application of any one of these tests?

In the first place, the words were much too vague to raise a trust, or be considered equivalent to a testamentary disposition; they amounted to no more than an expression of the testatrix's expectation that her daughters would, in the event contemplated, be prompted by natural affection to leave their property to their nearest relations; an expectation which had, in fact, been fulfilled, though the daughters had exercised their own discretion, as they had a right to do, in disposing of property which was absolutely vested in them — in selecting the particular objects, and apportioning the shares of their bounty.

As

(a) 1 *Turn. & Russ.* 143.

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As to the second test, namely, the certainty of the subject, the words "what they have" would comprehend property of which the testatrix had no right whatever to dispose; and, in point of fact, both the sisters died in possession of very considerable property which they derived from other sources than the will of their mother. That circumstance alone was conclusive against the argument that a trust was created by the language of this codicil.

Nor were the objects of the supposed limitation less uncertain than the subject; for the words might import a disposition either among the brothers and sisters, or among their children; and supposing it to be intended that the children were only to stand in the place of their parents, the words were open to all the difficulties arising from the disposition of property among classes who were to take in succession. It was impossible, for instance, to say, whether the testatrix intended to exclude any, and what individuals of each class, in the events, which had actually happened, of one of the class of brothers and sisters dying in her lifetime, and others of the class of children dying, or coming into *esse*, at different periods between the date of her will, her own death, and the death of each of her eldest daughters. In no view of this case, therefore, could it be contended that a trust was created, or that the property in question did not vest absolutely in the two eldest daughters.

Mr. *Pemberton* and Mr. *Crompton*, for the Plaintiffs.

Mr. *Bickersteth*, Mr. *Tinney*, Mr. *Ellison*, Mr. *Schomberg*, and Mr. *Flather*, for different Defendants.

The

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1832.

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I consider the words of this codicil, as words expressing the expectation of the testatrix, but not as words of recommendation, or as intended to create an obligation upon the two eldest daughters. The words apply not simply to the property given by the testatrix, but to all property which the daughters might happen to possess at their deaths, leaving what she gives by her will at their disposition during their lives, and extending to property which might never have belonged to her, and wanting altogether certainty of amount.

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Bequest of a residue to *D.* for life, with remainder to her daughter *L.*, if she should survive her mother and attain twenty-one; but, if not, then to such other children of *D.* as should be living at their mother's decease, and should attain twenty-one; and if all such other children of *D.* should die under twenty-one, then over to *M. D.* survived her daughter *L.*, and her only other child attained twenty-one, but died in her lifetime: Held, that on the death of *D.* leaving no children, the bequest over to *M.* took effect.

THE will of *Lydia Vernon* gave the residue of her personal estate to trustees, and the survivor, and the executors and administrators of such survivor, upon trust to invest the same in the public funds, or on real securities, and to receive and pay the dividends and income thereof, as the same should become due and payable, unto her daughter *Caroline Dewar* during her life. It then proceeded in these words: — “And from and after her decease, upon trust to assign, transfer, and pay the principal thereof, with the dividends and interest then grown, unto my said grand-daughter *Caroline Lydia Dewar* [who was the daughter of the said *Caroline Dewar*], if she shall survive her said mother, and live to attain the age of twenty-one years, and in the mean time, after her said mother's decease, to pay and apply the dividends, interest, and income thereof for or towards her maintenance and education. And in case the said *Caroline Lydia Dewar* shall not survive her said mother, and live to attain the age of twenty-one years, then upon trust to assign, transfer, and pay all the said trust-stocks and premises to such other child or children of my said daughter *Caroline Dewar*, in such manner as she shall, by any writing under her hand, notwithstanding her coverture, nominate, direct, or appoint; and for want of such nomination, direction, or appointment, then in trust to assign, transfer, and pay all the said trust stocks, securities, and premises, to such other child or children of my said daughter *Caroline Dewar* as shall be living at the time of her decease, equally to be divided between them, share and share alike, if more than one, and if but one, then the whole

to

to such only child, and to be paid them respectively after their said mother's decease, when and as they respectively shall have attained the age of twenty-one years; and in the mean time, after their said mother's decease, the income of their respective portions to be paid or applied for or towards their maintenance and education respectively. And in case of the death of any of them before such age, then the share or shares of such child or children so dying shall go and be paid to the survivors or survivor of them, at such time as his, her, or their original share or shares is or are made payable as aforesaid. And if all such other children of my said daughter *Caroline Dewar* shall happen to die before attainment of the said age of twenty-one years, then in trust for, and I give the same to my daughter *Louisa Mackinnon*, her executors, administrators, and assigns."

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The testatrix, *Lydia Vernon*, died in the year 1789; *Caroline Lydia Dewar* died in the year 1800, in the lifetime of her mother *Caroline Dewar*, who in the year 1804 made an appointment of 1000*l.* 3 per cent. stock, part of the testatrix's residuary estate, in favour of her son and only other child *John Dewar*. *John Dewar* died in *December* 1812, after having attained the age of twenty-one; and *Caroline Dewar*, the mother, died in *April* 1821, having outlived both her children.

At the hearing on further directions, the question raised between the Plaintiff, claiming as personal representative of *Louisa Mackinnon*, and some of the Defendants who claimed under the testatrix's next of kin was, whether, in the events which had happened, the bequest over to the testatrix's daughter *Louisa Mackinnon* had taken effect, or whether in those events the testatrix had died intestate as to her residuary estate.

The

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The Vice-Chancellor having decided that the bequest in favour of *Louisa Mackinnon* was effectual (a), an appeal was now brought from his Honor's decree.

Sir *E. Sugden* and Mr. *Barber*, in support of the appeal.

The gift over in favour of *Louisa Mackinnon* has failed, inasmuch as the event has not happened on which that gift is made contingent. The limitation is to such other children of Mrs. *Dewar* as shall be living at the death of their mother, and if all such other children shall die under age, then to *Louisa Mackinnon*. In point of fact there was no such child, that is to say, no child who survived the mother, and died before attaining twenty-one. The case, therefore, in which *Louisa Mackinnon's* contingent interest was to vest, if at all, has not occurred; and the event which has taken place, of the children attaining twenty-one and dying in the lifetime of the mother, the testatrix has wholly overlooked, and consequently omitted to provide for. She assumed that if children attained twenty-one they would be living at their mother's death, and therefore she did not give the fund over in the event of such children not being then alive. She never meant the limitation over to take effect if the children attained twenty-one; or, if that was her meaning, she has not expressed it, and the Court has no right to make a will for her. The words describing the condition on which the interest given to *Louisa Mackinnon* was to arise are clear and unequivocal; that condition has not been fulfilled in either of its parts; for no child of Mrs. *Dewar* survived her, and died under twenty-one; and unless it is to be laid down as a general proposition, that a legacy can never be given
upon

(a) 5 *Sim.* 78., where the will and the facts of the case are more fully stated.

upon a contingency, a proposition entirely opposed to the authorities, this decree cannot be supported. His Honor in his judgment relied upon *Jones v. Westcomb*, *Murray v. Jones*, *Statham v. Bell*, and *Gulliver v. Wickett*, a class of cases which really have no application here. *Gulliver v. Wickett* (a) only decided, that when an estate is devised to the child of A., and if that child die under twenty-one, then over to B., the devise over takes effect, although by reason that a child of A. never came into *esse*, the preceding estate never vested; in other words, that the terms of the condition include by necessary implication the case of there being no child, the object plainly being that, if no child attained twenty-one, which was substantially the condition of the gift, the limitation over should take effect; and this was equally answered, whether a child never came into *esse*, or whether, having come into *esse*, it died under age. The decisions in *Jones v. Westcomb* (b), and *Murray v. Jones* (c), depended on precisely the same principle. In the latter case, if the testatrix had but one child living at her decease, she gave certain property over in favour of Mrs. *Fawcett* and her issue; and it was held, that though the testatrix in fact left no child, the bequest over was effectual. The condition was there read as if it had stood, "in case I leave no more than one child," which was obviously the meaning of the expression, and which strictly included within it the case of there being no children. These cases, however, are very different from the one before the Court; for in all of them it will be found, upon examination, that the individual who was to take the intermediate estate on which the limitation over was made to depend never had existence; whereas here, the children to whom the prior estate is given did come into

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(a) 1 *Wils.* 105.

(c) 2 *V. & B.* 313.

(b) *Proc. Ch.* 316. 1 *Eq. Ca.*
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into *esse*, but did not die in the manner prescribed by the will in order to entitle the conditional legatee. The decision is at variance with all the cases, which establish beyond dispute, that where a legacy is given over upon a contingency, the very contingency specified must happen before the legatee over can take any thing: *Williams v. Chitty* (a), *Miller v. Fawc* (b), *Doe v. Shipphard* (c), *Calthorpe v. Gough* (d), *Simpson v. Vickers* (e), *Baker v. Hanbury*. (g) The decision in *Calthorpe v. Gough* was very much considered in the subsequent case of *Doo v. Brabant* (h), and has been uniformly followed and approved of since.

Mr. Pepys, Mr. Swanston, and Mr. Ching, for other parties interested in supporting the appeal.

The Attorney-General (Sir W. Horne), Mr. Knight, and Mr. Beames, in support of the decree.

The Appellant's argument proceeds throughout upon a confusion of two things, in themselves perfectly distinct,—gifts strictly upon condition, and what have been termed conditional limitations. With respect to the former, the very event upon which the gift over is made contingent must be fulfilled exactly and *in specie*, before any subsequent estate limited upon it can ever arise. With respect to the latter, it is enough that the preceding limitation is entirely out of the way, and fails of effect,—whether in the precise mode specified in the instrument, or in any other, is immaterial,—and then the ulterior gift, which, though subsequent in point of time, is in truth an independent limitation, immediately comes

(a) 3 Ves. 545.

(e) 14 Ves. 341.

(b) 1 Ves. sen. 85.

(g) 3 Russ. 340.

(c) Doug. 73.

(h) 5 Bro. C. C. 395. 4 T. R.

(d) 3 Bro. C. C. 395. n. 4 T. 706.
 R. 707. n.

comes into operation. The bequest to *Louisa Mackinnon* belongs to the latter class. It is posterior in the order of time to the gift in favour of Mrs. Dewar's children; and the instant that gift falls to the ground, in consequence of there being no individual answering the description of the person who is to take it, the limitation over takes effect. *Statham v. Bell* (a), *Murray v. Jones* (b), and the other cases referred to, have fully established this principle, that, although on the face of a will words may be found which, taken literally, would apparently import a condition, the Court is not, therefore, prevented from construing them as words of limitation, where common sense and the probable intention of the testator require it; and that, in general, wherever a legacy is given to a party by way of substitution, after a preceding conditional gift to another class of takers, such legacy will equally have effect, whether the preceding legatees have not fulfilled the condition of the gift, or have never come into existence. These principles apply strictly to the present case, which is on all fours with *Murray v. Jones* (b) and *Gulliver v. Wickett*. (c) The prior bequest is, on the death of *Caroline Lydia* in the lifetime of her mother, to such other children as shall survive their mother and attain twenty-one. Now there never were any children who answered that description: no children survived their mother; of course no such children attained twenty-one, so that the objects of that bequest never came into esse. The intermediate limitation, therefore, may, from the objects having failed, be put entirely out of view, and the gift in favour of *Louisa Mackinnon*, whose interest was intended, and, in substance, directed to arise, in case no other children of Mrs. Dewar survived their mother

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(a) *Comp.* 40.

(b) 2 *V. & B.* 513.

(c) 1 *Wils.* 105.

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another and attained twenty-one, is, of course, accelerated, and takes immediate effect.

Sir E. Sugden, in reply,

Dec. 16.

The LORD CHANCELLOR.

The question here arises upon the construction of *Lydia Vernon's* will, the residuary clause of which gives the residue to her daughter *Caroline Dewar* for life, and after her decease to her grand-daughter *Caroline Lydia*, if she shall survive her mother and attain the age of twenty-one; and in case she shall not survive her mother and attain that age, to such of *Caroline's* other children as she shall appoint; and in default of appointment, to such other child or children of *Caroline* as shall be living at the time of her death; to be paid when they respectively attain twenty-one. It then gives the shares of such surviving children who may die under twenty-one to the survivors or survivor, to be paid at his or their reaching that age. Last of all comes the gift over upon which the case turns, and which provides for the event of all the other children dying under twenty-one. These provisions already recited, having proceeded on the supposition that *Caroline Lydia* might not come within the description of surviving her mother and attaining twenty-one, all relate to the other children of *Caroline*, and the gift over is confined to the same class, viz. the children other than *Caroline Lydia*, who had been, as it were, disposed of. The same provisions, too, had contemplated the case of one or more of the children of *Caroline* dying under age. There remained to be provided for the case of all those children so dying, and for that the latter part of the clause—the gift over—provides, by directing that if all such other children of *Caroline* hap-

pen to die under age, then the residue shall go to the testatrix's other daughter *Louisa Mackinnon*, her executors, administrators, and assigns.

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Caroline Lydia died in the lifetime of her mother; and *John* her brother, in whose favour *Caroline* partially executed the power of appointment, survived *Caroline Lydia*, but predeceased his mother, not, however, before he had attained twenty-one. Thus he was excluded from all the residue beyond what he took under the partial appointment; because he did not survive his mother. But as he died after majority, the question is, whether or not the gift over takes effect, that gift being given, if all such other children of *Caroline* die under age?

Was he, then, one of this class? If he was, clearly the executory limitation cannot take effect; for all the children of *Caroline* did not die under age. Supposing, therefore, the words "all such other children of *Caroline*" were read as if they stood "all the other children of *Caroline*," that is, all except *Caroline Lydia*, but without any other specification or distinction, it is unquestionable that the gift over could not take effect without doing violence to the plain meaning of the clause; for not only the event has not happened upon which the executory limitation was made to depend, but the contrary has happened, one of *Caroline's* children having reached majority. Nor can this position be denied upon the ground of the provision being a conditional limitation, and the event having only defeated a precedent limitation, or removed out of the way a precedent estate. For words importing contingency or condition shall never be taken as creating a conditional limitation, unless to effect the plain meaning of the testator, and never where the intention clearly imports a condition precedent, and nothing can differ more than a gift over, if all *Caroline's*

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children die under age; and a gift over, if all of them do not reach majority.

But the decree of his Honor does not rest upon any such ground. The Respondent does not read the words as if they were "all the other children of *Caroline*," but takes them literally as they stand, "all such other children of *Caroline*," and contend that they describe one class of the children of *Caroline*; namely, those who survived her. Now, as none survived her, and, therefore, that class never came into existence, it is argued that the intention was effectually fulfilled by taking the words as words of limitation, upon the authority of that class of cases of which *Jones v. Westcomb*(a) is the leading, though certainly not the strongest, or the most remarkable, decision.

To support the decree, the Court must be satisfied of two things; first, that the words bear the construction put upon them, and, secondly, that the clause so construed comes within the principle applicable to cases of this description, and may be taken, upon the authorities, as only apparently a condition, but really a limitation.

First, I am clearly of opinion that the words describe such children of *Caroline* as survived her; and this, whether regard be had to their literal import, or whether they be taken in connection with the rest of the will, or considered with reference to the place in which they occur. The testatrix, having first provided for the event of *Caroline Lydia* surviving *Caroline* and reaching twenty-one, proceeded to provide for the opposite event of her not surviving, and attaining majority. In that case—in case she either predeceased or died under age—

she

(a) 1 Eq. Ca. Abr. 245. pl. 10.

she was to take nothing whatever. All the provisions that follow, therefore, relate to the other children of *Caroline*, *Caroline Lydia* being now supposed to be out of the question. A power is first given to *Caroline* to appoint among those other children, without any restriction, either as to survivorship or majority. And this is the only part of the will where neither contingency is introduced. Then come the provisions, in case that power shall not be exercised. The residue is to go among the other children of *Caroline* who shall survive her, with a clause of accruer in case any shall die under twenty-one. And although some doubt might arise upon the construction of this clause, as to whether the accruing or only the original shares are subject to its operation, the rest of the provisions make it quite unnecessary to settle that point. But one thing is unquestionable; the class of persons indicated and dealt with, through the whole of this branch of the will, is the same; namely, children of *Caroline*, surviving her. None else are or can be here referred to; the words "they," "them," "any of them," all mean those surviving children. Then immediately follow the expressions, "such child or children so dying," that is, under twenty-one; their shares are to go to the survivors of them, (that is, of the survivors of *Caroline*;) and be paid at the age of twenty-one. It is important to remark that immediately after this plain reference to the survivors of the children who survive their mother comes the clause in question, containing the gift over,—"and if all such other children of *Caroline* shall happen to die before attaining the said age of twenty-one," &c., so that this clause is really a part of that branch of the will, the subject of which is confined to the children of *Caroline* surviving her; and plainly refers to the immediately preceding words of reference, "such," "them," "any of them;" and, what is almost decisive of the meaning,

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independent of the words themselves, it provides for the very event which the preceding provisions had left unprovided for, those provisions having contemplated the death, under age, of some of the surviving children, and made an accruer of their shares to those who attained twenty-one, but this last provision contemplating the event of their all dying under age, in which case the residue is to go over to *Louisa Mackinnon*,—"all such other," in contra-distinction to one or more of such other, the case already provided for.

From this, which is, indeed, the natural construction, the other doing great violence both to the language of the clause and to its connection with the rest of the will, it would follow that, if any one of *Caroline's* children had survived her and died under age, the executory limitation over would have taken effect according to the strictest construction of the provision, and taking the contingency as a condition precedent; for that condition would then have been literally fulfilled, as all the surviving children of *Caroline* would have died under twenty-one. *John*, who predeceased her, it is true, did reach that age; but he does not come within the description of "all such other children:" he was not a surviving child. But as no child survived *Caroline*, and the class described, therefore, never came into existence, we are next to consider the second proposition upon which the decree rests, that the clause may be taken as importing limitation, and not a precedent condition.

What has been said upon the sense of the words, and their connection with the foregoing provisions, greatly aids this view of the matter. It shews the intention of the testatrix to provide for the event left unprovided for, the event of all those children being removed before majority.

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majority. Surviving their mother and coming of age are the events constantly kept in view throughout this branch of the will, and both together. Surviving goes for nothing, unless the children live to attain twenty-one, and *vice versa*. *Caroline Lydia*, the first legatee of the residue, takes nothing, if she either predeceases her mother, attaining twenty-one, or survives her, and dies under twenty-one; nay, in either case, she not only takes nothing under the will directly, but she is excluded from the benefit of the appointment, the power being confined to the other children at whatever time they die. Then, all the gifts to those other children are carefully confined to such as reach majority; and there seems nothing at all inconsistent with this frame of the residuary clause in supposing that the testatrix intended to prefer her daughter *Louisa Mackinnon*, if none of her grandchildren survived their mother and reached twenty-one,—those two conditions being throughout in her view, and never lost sight of except in one instance only, where she is not herself distributing the residue, but devolving the distribution of it upon another by creating a power. There seems, therefore, nothing inconsistent with the general intent in giving effect to this executory limitation, by treating it as a gift over upon the removal out of the way of the preceding interests, in whatever manner that removal is effected; whether by persons coming into existence, so as to make the interests vest, and their dying under twenty-one, so as again to divest their estates, or by their never coming into existence, and thus never taking the interests at all.

As it may be said that the authorities for the doctrine to which I am referring do not exactly touch a gift of this precise kind, it may be proper to examine those authorities somewhat more closely, in order to ascertain whether they differ from the present case in point of prin-

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ciple, or only in the particular circumstances. The apparent diversity, to state it generally, is this, that in most, if not all the cases, the event which actually happened comprehended that for which the gift provided, as the greater includes the less, so that the one of necessity involved the other in substance and effect; whereas here there is no such necessary consequence. Thus, in a gift to *A.*, if the child of which *B.* is *enceinte* does not reach twenty-one, the event guarded against of *B.*'s child reaching twenty-one never can happen if she is not *enceinte*; but in a gift to *A.*, if *B.*'s child surviving her does not reach twenty-one, the event guarded against of *B.*'s child reaching twenty-one may happen though it dies before its mother. Accordingly it will be found that to reconcile the present case with the authorities, we must consider the event guarded against to be, not a child of *Caroline* reaching twenty-one, but a surviving child of *Caroline* reaching that age. And the whole frame of the clause which requires that the children should survive their mother, as well as attain majority, justifies the Court in adopting this qualification.

All or almost all the cases upon which this doctrine is founded are referable to one consideration, which it is very material to keep in view. The construction which they authorize is never inconsistent with, far less contrary to the plain intention of the clause itself, but only aids or furthers that intention, by supplying a manifest omission. In other words, no real difference is made in the result, for the event contemplated has not happened, but something equivalent has taken place; that is, something which made it impossible that the result could be otherwise than that upon which the executory limitation was made to depend. Almost all the cases are those of double contingencies, the second being of a negative nature,

nature, so that the first not happening amounts to the same thing as if both had happened. Thus a bequest over to *A.* in case the first takers, the unborn children of *B.*, die before they reach twenty-one, read as a condition, is a bequest to *A.* if *B.* has children, and they do not live to twenty-one; and the first or affirmative contingency not happening, it follows of necessity that the second or negative must. If it is read as to its substance and import, and not resolved into its parts, the bequest is, in case no child of *B.* reaches majority, and of course none can if he have none. This is the simplest case, but the others are all similar in principle. Thus, a gift over in the event of the child in *ventre sa mere* dying under age is a gift if there be such a child born, and it does not reach majority. The child cannot reach majority if it never existed, which was the case of *Jones v. Westcomb* (a), and *Statham v. Bell* (b), or if it was still-born, as in *Foster v. Cook*. (c) Therefore, taking the condition to be, what it is in substance, that no child should reach twenty-one, even as a condition precedent, it has been strictly fulfilled. At any rate, no effect is given to the executory limitation, which is repugnant to the conclusion that would have followed from considering the matter in the light of a condition precedent.

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In like manner, when the event, upon the happening of which the executory limitation vests, is, that the testatrix should have "but one child," this must be considered as meaning "no more than one," unless there be something in the limitation that connects it with the existence of one at the least, in which case the condition becomes affirmative and not negative. Accordingly, in *Murray v. Jones* (d) it was held that such

a con-

(a) 1 Bq. Ck. Abr. 245.

(c) 3 Bro. C. C. 547.

(b) Comp. 40.

(d) 2 V. & B. 312.

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a condition meant in case there should be no more children than one; and that, there being none, the event had literally happened; but it is clear from Sir *William Grant's* reasoning, that if any thing whatever had turned upon there being one son, he would have decided the other way. This case, it may be remarked, is not so plainly one proceeding upon the principle established in *Jones v. Westcomb* (a) as some others.

The general observation which has been made upon the foundation of this doctrine applies to all the cases. Thus in *Avelyn v. Ward* (b), the devise over to *Ward* was, if *Urling*, the preceding devisee, should neglect to execute a release after the testator's death, and *Urling* died in the testator's lifetime. This was held a conditional limitation, and not a case of condition; but there was nothing in this view repugnant to the nature of the condition, if it had been taken as such. For the death of *Urling* before the testator, and the event of *Urling* surviving the testator and neglecting to execute the release, were one and the same thing as regarded the release. So in *Doe v. Scott* (c), if the devisee over had survived the testatrix, he would have taken, though there had been no default in the first devisee to convey an estate to him within six months after the decease of the testatrix. There plainly the event contemplated of no conveyance being made was consistent with, or rather was secured by the event which actually happened, the predecease of the first devisee. Again, where the gift is to the testator's children surviving him, and if they all die under twenty-one, then over, the condition is substantially fulfilled; the event in effect happens, if the testator leaves no children; for his meaning

(a) 1 *Eq. Ca. Abr.* 245. pl. 10.

(c) 3 *M. & S.* 300.

(b) 1 *Ves. sen.* 420.

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clearly was to give the residue over if no child reached majority, and none could, if none existed. This was the case of *Meadows v. Parry* (a). Even the cases which seem less to fall within the scope of these observations, when considered attentively, are no exceptions. Thus *Holtroft's case* (b) was that of a limitation to the first and other sons of A. in tail, enumerating three, and then, if the fourth died without issue, to B; and it might be considered as really importing a gift to B. upon the failure of the issue of A's first four sons in succession, — an event included of necessity in that of A. having but one son, and that son dying without issue.

I have made these observations for the purpose of shewing that the cases all go upon a very rational and intelligible principle, — a regard to the substantial effect of the contingency specified, and so to the real intent of the testator. In all of these the clause may be taken as a condition, and treated as such, without any violence, provided we regard the substance and result, and not the mere form. And looking to the true import and effect, it will appear that even taken as precedent conditions they have been essentially fulfilled. Wherever this is not the case, wherever the words plainly import a condition as in the testator's contemplation, and where that condition cannot be understood to have been substantially complied with by the event which has actually happened, the gift over fails. Thus in *Murray v. Jones* (c) there was nothing to prevent the Court from reading the contingency of there being "but one child," as if it were "provided there be no more children than one," and this being satisfied and

(a) 1 V. & B. 124. (b) Mo. 486. (c) 2 W. & B. 313.

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more than satisfied by the event of there not being even one, the devise over took effect; but Sir *W. Grant* distinctly admitted that if any thing had turned upon the circumstance of one child coming into *esse*, the executory limitation would have failed, — in other words, the contingency could not have been read negatively, “no more children than one,” but must have been taken affirmatively, “provided there be a child,” and then the actual event would not only have been different from, but contrary to the event contemplated in the limitation.

Thus in *Doe v. Shipphard* (a), a devise to the testator's daughter for life, in case she survived her husband, with remainder to his grandson in tail and remainders over, was held to be on condition that she survived her husband; and her predecease defeated the remainders. Thus, too, in *Doe v. Brabant* (b), where a legacy was given to *A.* at twenty-one; and if *A.* died under age and left children, then to such children; and if *A.* died under age without leaving any child, or if all she left died under age, then over, and she predeceased the testator, but after attaining majority and leaving children, the principle of *Jones v. Westcomb* (c), and the other similar cases, was at first supposed by Lord *Thurlow* to apply and to let in the children; and when he sent a case to law, the same argument was pressed upon the Court of King's Bench. But that Court held it to be clear that those cases did not affect this, and decided that the legacy to the children failed, as being limited upon an event which had not happened; nothing being given to them in any other event. It is clear that in *Doe v. Brabant* the event which happened could in no way be said to comprehend the contingency contemplated, so as to satisfy either

(a) 1 Dougl. 175.

(c) 1 Eq. Ca. Abr. 245. pl. 10.

(b) 4 Cr. 708.

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either strictly or substantially the condition upon which the children were to take; and though the case which did arise would probably have been provided for if it had occurred to the testator, yet, being omitted, the Court could not supply it, and make a will for him.

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But it seems to me abundantly manifest that the present case comes within the first class of authorities, and is untouched by the others; always assuming that the words are to be taken, as I have shewn they must be, to import a dying under age of all the children of *Caroline* who survive their mother. For this is, in effect, a gift upon the failure of any child to survive *Caroline* and reach majority; and that failure has happened, or, rather more has happened; because none have survived at all, much less have any both survived and reached twenty-one. The class of children, whose dying under age forms the condition, never existed, and nothing turned upon their existing. The gift over was defeated if any surviving child attained twenty-one, but no surviving child existed; just as in the leading case the executory limitation was defeated, if the child in *ventre sa mere* reached twenty-one, and there was no such child *in esse*. If, indeed, as was said in another of the cases, any thing had turned on the circumstance of there being surviving children of *Caroline*, the reasoning would have failed; the contingency would have become affirmative; the condition, not being capable of being read as we have read it, would not have been fulfilled by the event; and the gift limited upon that condition would have been defeated.

The result of the reasoning, therefore, is, that both propositions appear to be established: first, that the words "all such other children" in the statement of the contingency mean all the children who survive their mother;

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mother; and, secondly, that the clause so construed is an executory limitation, which takes effect, although there be no children to answer the description by surviving their mother. But it is fit to observe, that this second proposition depends altogether upon the first, and would not be true unless the words were allowed the meaning which the first attributes to them; and also that, though the first proposition be admitted, the second depends upon taking the whole of the will together; for, if the preceding branches of it had been such as to make the existence of the class material, upon whose dying under age the executory limitation vests, that limitation would have been defeated, by the impossibility which would then have arisen of considering the event contemplated as included in the event which happened.

Having felt a good deal of doubt on this case when I first considered it; thinking it also of extreme importance that the rules should be well considered by which the construction of clauses of frequent occurrence is governed, and conceiving that there is here an apparent extension of the principle established in the older cases, I have thought it necessary to go at large into the question. A full examination of it has satisfied me that the decision is right, that no extension of that principle is required to support it, and that it is wholly unaffected by other authorities, while it is well borne out by those upon which it is professedly rested.

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BRADSHAW v. TASKER.

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May 24.

JOHNSON BRADSHAW by his will, dated the 7th of March 1820, gave and bequeathed to his executors *Thomas Tasker, Richard Butler, and Thomas Darwell* the sum of 300*l.* upon trust to pay the same to the person who called himself the treasurer, or to those who called themselves the trustees of the Catholic school in *Wigan*, in the county of *Lancaster*, which sum he charged upon his personal estate, and ordered to be paid out of the same, and applied for the use of and towards carrying on the good designs of the said school. And he also gave and bequeathed to his executors the further sum of 200*l.* upon like trusts for the benefit of the Catholic school in *Liverpool*; and the testator, after giving several other pecuniary legacies, bequeathed the residue of his personal estate to the Plaintiff *Johnson Bradshaw*.

A testator gave two legacies to the respective trustees of certain Catholic schools, upon trust for carrying on the good designs of the said schools. The testator died in 1823: Held, that the act of 2 & 3 W. 4. c. 115. for securing the charitable donations and bequests of his Majesty's Catholic subjects is retrospective, and that the trustees of the Catholic schools were entitled to the legacies.

The testator died on the 6th of May 1823; the executors proved the will, and a bill was filed on behalf of the plaintiff *Johnson Bradshaw*, an infant, against the executors for the administration of the testator's personal estate. The cause was heard before the Master of the Rolls, and the usual decree made for taking an account of the testator's personal estate. The legacies of 300*l.* and 200*l.* were, by an order on further directions, dated the 1st of June 1830, and by a subsequent order, dated the 29th of May 1833, directed to be carried over to the accounts of the *Wigan* and *Liverpool* Catholic schools respectively, but not to be paid without notice to the executors.

The trustees of the *Wigan* Catholic school presented a petition praying for the payment of the legacy of 300*l.*, which

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which petition was heard before the Vice-Chancellor on the 1st of *August* 1833, when his Honor declined making any order, being of opinion that the legacy was not within the act of the 2 & 3 *W. 4. c. 115. **; intituled "An Act for the

the

The following are the first and third sections of this act:—

"Whereas by an act passed in the first year of the reign of King *William* and Queen *Mary*, intituled 'An Act for exempting his Majesty's Protestant Subjects dissenting from the Church of *England* from the Penalties of certain Laws;' and by certain subsequent statutes the schools and places for religious worship, education, and charitable purposes of Protestant Dissenters, are exempted from the operation of certain penal and disabling laws to which they were subject previously to the passing of the said recited act of the first year of the reign of King *William* and Queen *Mary*: and whereas by certain acts of the parliament of *Scotland*, and particularly by an act passed in the year 1700, intituled 'An Act for preventing the Growth of Popery,' various penalties and disabilities were imposed upon persons professing the Roman Catholic religion in *Scotland*: and whereas, notwithstanding the provisions of various acts passed for the relief of his Majesty's Roman Catholic subjects from disabling laws, doubts have been entertained whether it be lawful for his Majesty's subjects professing the Roman Catholic religion in *Scotland* to acquire and hold in real estate

the property necessary for religious worship, education, and charitable purposes; and whereas it is expedient to remove all doubts respecting the right of his Majesty's subjects professing the Roman Catholic religion in *England* and *Wales* to acquire and hold property necessary for religious worship, education, and charitable purposes, be it therefore enacted, that from and after the passing of this act his Majesty's subjects professing the Roman Catholic religion in respect to their schools, places for religious worship, education, and charitable purposes in *Great Britain*, and the property held therewith, and the persons employed in or about the same, shall in respect thereof be subject to the same laws as the Protestant Dissenters are subject to in *England* in respect to their schools and places for religious worship, education, and charitable purposes, and not further or otherwise.

5. Provided always, and be it further enacted, that nothing in this act contained shall affect any suit actually pending or commenced, or any property now in litigation, discussion, or dispute in any of his Majesty's courts of law or equity in *Great Britain*.

the better securing the charitable donations and bequests of his Majesty's Roman Catholic subjects in *Great Britain*," inasmuch as the third section of that act provides that nothing contained in it shall affect any suit actually pending or commenced, or any property now in litigation, discussion, or dispute in any court of law or equity. The Vice-Chancellor farther observed that, as the legacy had been carried over by an order of the Court to the account of the charity, the question could not be argued without a rehearing of the cause, and he directed notice to be given to the infant Plaintiff as residuary legatee, that he might have the cause reheard as to the said legacies if he thought fit.

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&
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A petition of rehearing was accordingly presented to the Lord Chancellor by the infant Plaintiff, praying that the orders directing the legacies to be carried over to the accounts of the respective Catholic schools might be reversed, that the legacies might be declared void, and that the sums carried over might be declared to be part of the testator's residuary personal estate.

May 25.

Mr. Duckworth, for the infant Plaintiff.

There can be no doubt, that previously to the passing of the act of the 2 & 3 W. 4. c. 115. a bequest for the benefit of a Roman Catholic school was unlawful; *Cary v. Abbot* (a), *Attorney-General v. Power* (b), *De Themmittes v. De Bonneval*. (c) The first question here is, whether, upon the death of the testator when the will spoke, the legacies were absolutely void, and fell into the residue; or whether the first section of the 2 & 3 W. 4. c. 115. so far removes all disabilities of his Majesty's Catholic subjects

(a) 7 Ves. 490.

(c) 5 Russ. 288.

(b) 1 Ball & Beat. 145.

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jects in respect of their schools and places for religious worship and education as to operate retrospectively on a gift previously made to promote those objects. Supposing the first section of the act to be retrospective, another question arises, whether those legacies must not be governed by the law as it stood before the passing of the act, inasmuch as the third section provides that nothing contained in the act shall affect a suit actually pending, or any property now in litigation. There is no disposition on the part of the Plaintiff to defeat the intention of the testator, unless the Court shall be of opinion that that intention cannot be effectuated; but, as the Plaintiff is an infant, his interests are, of course, under the protection of the Court.

Mr. Lovat, for the trustees of the school, submitted to act as the Court should direct.

Mr. Spence, for one of the executors.

The LORD CHANCELLOR said he was of opinion that the act was retrospective; and that, as the trustees of the school were not litigant parties in the suit, which was a mere suit for the administration of the testator's estate, the case did not fall within the exception in the third section of the act.

The petition was accordingly dismissed; and the trustees of the Catholic schools were declared to be respectively entitled to the legacies of 300*l.* and 200*l.*

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AS
REBEAT

BENNETT v. COLLEY.

Dec. 13, 14, 16.

THE will of *Samuel Bennett*, and all the facts and circumstances material to the determination of the question in this cause, are very fully stated in Mr. *Simons'* report of the case when it came on for argument in the Court below. (a) They are also shortly recapitulated in the following judgment.

The Vice-Chancellor having made a decree according to the prayer of the bill, the Defendants presented a petition of rehearing to the Lord Chancellor.

Mr. *Pepys*, Mr. *Tinney*, and Mr. *Stuart*, in support of the decree, relied upon *Lord Milsumtown v. Lord Portmore* (b), and *Colegrave v. Manby* (c).

Mr. *Knight*, Mr. *Rolfe*, and Mr. *Jacob*, for the Defendants, contended, that the defence set up by the answer was fully borne out by the evidence in the cause; and they commented very minutely on the character and effect of the different depositions. They further strenuously insisted, that the Plaintiff, by joining in the recovery, must have had actual or, at all events, constructive notice of his rights under Mr. *Bennett's* will; and that his conduct in lying by for a period of thirty years—from the year 1800, when he came of age, till

A testator devised a freehold estate to A. for life, with remainder to his first and other sons in tail male; and he directed that a church lease which he held for a term of twenty-one years, renewable every seventh year, should be regularly renewed by the persons successively possessing the freehold estate under his will, and be enjoyed together with the same. A. omitted to renew in proper time, and the lease expired in 1798. A.'s eldest son came of age in 1800, and thereupon joined with his father in suffering a recovery of the freehold estate. A. died in 1830,

after

(a) 5 Sim. 181.

(c) 6 Mad. 72. 2 Russ. 238.

(b) 3 Mad. 491. 5 Mad. 471.

and in 1831 the son filed his bill, praying compensation for the loss of the lease, out of his father's assets: Held, that there was no such laches or acquiescence on the part of the Plaintiff, as to debar him of his equitable remedy.

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after the death of his father in the year 1830—without filing a bill or even uttering a complaint, was such an acquiescence on his part in the alleged breach of trust as precluded him from now coming forward, in a court of equity, to claim any compensation for the loss which his interest might have sustained in that respect. If he had thought proper to set up any such demand in his father's lifetime, his father would, in all probability, have reduced his allowance or have behaved less liberally to him in his will. The decision under appeal introduced an entirely new principle with respect to length of time as raising a presumption adverse to a plaintiff. Hitherto it had been supposed that time began to run from the moment when the remedy first accrued; but now it appeared that the time was to be computed from the period when the assessment of the damages would be most easy. Such, at least, was the result of the judgment of the Vice-Chancellor, who, while he fully admitted that the Plaintiff might have filed his bill immediately on coming of age, held, nevertheless, that such a course was not imperative, but optional; in other words, held that a double term of grace was to be allowed to a party coming as a suitor into this Court: first one commencing from the instant when the wrong was committed; and afterwards another, from the time when the amount of that wrong became most easily capable of estimation.

Upon the question of acquiescence and lapse of time the following cases were cited: *Townsend v. Townsend* (a), *Andrew v. Wrigley* (b), *Chalmer v. Bradley* (c), *Harrison v. Hollins* (d), *Price v. Copner* (e), *Whalley v. Whalley*,

(a) 1 *Cox*. 28. 1 *Bro. C. C.*
 550.
 (b) 4 *Bro. C. C.* 125.

(c) 1 *J. & W.* 51.
 (d) 1 *Sim. & St.* 471.
 (e) 1 *Sim. & St.* 347.

Whalley (a), *Cholmondeley* v. *Clinton* (b), *Foster* v. *Blake*. (c)

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The general nature and effect of the evidence adduced in support of the various grounds of defence set up by the answer, may be sufficiently collected from the judgment of the Lord Chancellor.

The LORD CHANCELLOR.

Dec. 16.

Samuel Bennett, being possessed of the moiety of an unexpired term of twenty-one years, held under the dean and chapter of *Chester*, in the rectory and great tithes of *Shotwick* and *Great and Little Sanghall*, by his will, dated the 13th of *September* 1763, devised his manor of *Shotwick*, and also his freehold estates of inheritance at *Great and Little Sanghall* and elsewhere, to his wife for life, and after her decease to *John*, the eldest son of his nephew *Samuel Nevitt* for life, with remainder to his issue in tail; with a proviso, that after the first renewal by his trustees of the lease of the said great tithes at *Shotwick*, the person for the time being in possession of such tithes under his will should continually renew the same, so that the possession of the same tithes should continue to the parties for the time being possessed of his manor of *Shotwick*; and he gave the said tithes to the person or persons for the time being possessed of the said manor under his said will.

The testator died in *September* 1763, and his widow thereupon entered into possession, and held the lease (renewing it regularly at the proper periods), till the month

(a) 3 *Bligh*, 1. O. S.

(c) 4 *Bligh*, 140. O. S.

(b) 1 *T. & Russ.* 107. 4 *Bligh*, 1.
O. S.

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month of *December* 1777, when she died. Upon her death, Mr. *John Nevitt*, the tenant for life in remainder under the will, was let into possession of the freehold and leasehold property, and assumed the name of *Bennett*; and he continued to hold the freehold estates, and to receive the rents and profits thereof, from the year 1777 till his death; but notwithstanding the direction in the will, and the condition thereby imposed on him, to keep the lease on foot by renewing it from time to time, he neglected to obtain such renewal in the year 1784, and the lease accordingly expired on the 29th of *November* 1798, about two years before the Plaintiff *Samuel Nevitt Bennett*, who was his eldest son and the first tenant in tail in remainder of the devised estates, attained the age of twenty-one. In the year 1800, *John Nevitt Bennett* and the Plaintiff (who had then just come of age), joined in suffering a common recovery of the devised estates. In the year 1830 *John Nevitt Bennett* died, and in 1831 this suit was instituted by the son to obtain compensation out of his father's personal property for the loss he had suffered in consequence of the non-renewal of the lease.

The answer set up several defences. It denied that the leases under the dean and chapter were renewable, except at the discretion of that body; it alleged that *John Nevitt Bennett* had been very desirous to have the lease renewed, and had applied to the dean and chapter, who had refused; that the lessee of the other moiety of the tithes, *Thomas Doe*, was about the time in question, *November* 1784, incapable in mind and could not surrender, so that the lessors might renew; that after *Doe's* decease, which happened in 1785, *John Nevitt Bennett* had applied in 1791 and 1792 to have a renewal to him and *Ackerly*, *Doe's* representative, but had met with a refusal; that the Plaintiff had, before his father's death,

possession

possession of a copy of the will of *Samuel Bennett*, and must have known of the lease; and, lastly, that he had acquiesced in the non-renewal.

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Issue being joined, a number of witnesses were examined; and several letters were given in evidence; and I am of opinion that the defences have not been supported by the evidence; that the proof, on the contrary, goes in most particulars to rebut the defences, and that, in some points, where there is no evidence either way, the burden of proof lay upon the Defendants.

The result of the evidence as to the right of renewal is, that the chapter never, at the period in question, refused to renew, provided application was made, or the lessee took his renewal within six months after the expiration of the seventh year; but that, if this period were suffered to elapse, the tithes would be taken into the hands of the chapter or let to others. But that body appears more recently to have refused renewals if the lessees allowed the seventh year to expire, being desirous of obtaining possession, and leasing to members of their own body, or to trustees for them. A concurrent lease had accordingly been granted in 1795, on the supposition that the one in question not having been renewed, must, of course, expire in 1798. It is plain, that this is all quite consistent with the case of the Plaintiff that *John Nevill Bennett* had allowed the lease to expire, and inconsistent with the Defendant's statement that he could not have obtained a renewal.

There being then no evidence whatever of a refusal to renew, unless the letter, which is without a date, can be called evidence; a letter, which is after all of equivocal import; and if not relating to the earlier period,

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proves nothing at all; the next question is, as to the alleged incapacity of *Thomas Doe*. Several persons speak of that individual as of eccentric habits; so far they swear to facts, and they add, what is their belief or opinion merely, that he was of unsound mind. But if the proof were much more conclusive, it is wanting in precise reference to the period in question; and there is evidence on the part of the Plaintiff which shews, that *John Nevitt Bennett* never thought of setting up the insanity of his companion in the lease as the reason of his having failed to obtain a renewal: nay, there is evidence that he did not allege his failure at all, or pretend that he ever had attempted to obtain it. The result of the examination and cross-examination of the witnesses on this point is, either that he had intended to let the lease run out, in order to benefit his daughters at the expense of his son; or, that having through his negligence suffered the time to pass within which he might have renewed, he contented himself with the reflection, that the son only would be injured, who, he said, had enough, and that it would be the better for the daughters; but that, whichever of these suppositions we adopt, he, at any rate, did state his own neglect as the cause of the non-renewal, and blamed himself, though slightly, accordingly. As for the letter of the 29th of *November 1784*, it is of most ambiguous meaning, and may just as well fit a supposition, that *John Nevitt Bennett* was refusing to renew upon the ordinary terms, as that he was making application and found obstacles in his way from *Doe's* supposed incapacity. Taken as it stands, nothing whatever is proved by it. But it seems rather less probable that *Doe's* situation should be alluded to, than any more usual ground of difference.

But,

But, according to the case of *Colegrave v. Manly* (a), it would have been of little importance to the ultimate decision of this case, although the Defendants had succeeded in shewing that *John Nevitt Bennett* could not obtain a renewal, provided there had been a renewal afterwards obtained; and by parity of reason, to the question of ordering an inquiry into the damage sustained it would have been of no importance, inasmuch as that damage would be measured by the possibility of afterwards getting a renewal if *Samuel Nevitt Bennett* failed. The Court there held, that whether the tenant for life could or could not obtain the renewal, still he had no right to the portion of the rents and profits destined, by the condition under which he enjoyed the estate, to defray the expense of renewing.

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That the Plaintiff knew of the will by having a copy or otherwise, or that he knew of the lease and its expiration, there is no evidence at all. This is clearly not a case to which constructive notice, as by joining in making a tenant to the *præcipe* when the recovery was suffered, can be applied without straining the principles of this Court with regard to notice to a use for which they never were designed. The probability is suggested of the Plaintiff, who was serving his apprenticeship at *Chester*, four miles off, being aware of his father having the tithes down to 1798 and no longer. This is far from an inevitable conclusion; but if it were true, does it follow that he knew not only of his father's having had the tithes, or ceasing to have them, but of his having been lessee under the dean and chapter, and his having intended to renew his lease? The allegation of the bill, that he knew nothing of the lease and neglect to renew till his father's death,

is

(a) 6 *Mad.* 72. 2 *Russ.* 238.

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is well pleaded for the purposes of the suit; and if the defendant had either proved the affirmative of that negative issue, or given evidence (of which there is not a tittle), to support his opposite and contradictory averment, that the Plaintiff knew of the will, then he would have stood on better ground. Nor do I consider that any thing material turns upon the Plaintiff not having denied in his statement that he knew of the will; his knowledge of which could only be important as negating his averment, that he had no notice of the lease and non-renewal.

Having gone through the evidence, the case is very nearly at an end. For it can never be maintained that the acquiescence of a party, under ignorance of his rights, operates as a waiver of any claim, or as a confirmation of any thing done against him. Neither can it be seriously contended that the proof of ignorance, or want of notice, lies on the party against whom such acquiescence is alleged: and, therefore, nothing remains to be considered but the argument, that by the mere lapse of time after the Plaintiff attained his full age, he is barred of his remedy. As no laches after the death of the tenant for life can be imputed to him, they who set up this as a bar, must rely upon the assumption, that the doors of this Court were open to him during the subsistence of his father's life estate.

Now, first, as a defence by a trustee, this bar cannot be set up; and no more in the case of the trustee of an equity, than of any other trustee. The ground of the present application to the jurisdiction is, that the rents and profits of the estate, the tithes in *J. N. Bennett's* hands, were the property of the remainder-man his son; that part, namely, which should have gone to pay the fine for renewal and other expences attending it, that part,

part, the paying of which for those charges was the condition under which he enjoyed the residue.

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Upon this point many cases have been cited, which have no application to the question. In all of them the act which constituted the wrong, or created the equity was complete; the cause of action or suit had accrued, and the party out of actual possession having his remedy open to him at any instant of the time, the possession was equally adverse, as against him and against the owner of the particular estate. Here, however, the case is altogether otherwise. The *quantum* of damages could not be ascertained till the tenant for life died; because, till then it was impossible to know what would be the residue unexpended of the lease; and the present proceeding could not have been instituted. The suit, if instituted in *John Nevill Bennett's* life, could only be brought either from an apprehension that he was about to suffer the lease to expire, and then the Court, upon reasonable grounds being shewn by the threats or acts of the tenant for life, might have granted a receiver, in order to provide a fund for renewal, and might possibly have compelled him to renew; or, if he had already suffered the lease to expire, the application might have been granted on that default for a receiver; though in such a case it could only have been to provide a fund for compensation. But neither of those suits is this suit. The not having brought the former suit indeed, goes for nothing; because the non-renewal had taken place in 1784, and even the residue of fourteen years had expired during the Plaintiff's infancy.

His not bringing that suit then would be nothing to the present purpose; both because he was an infant during the whole period when he could have brought it, and because, though he had been of age, it was a proceeding pointed to a remedy of a wholly different kind.

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After he became of age, and after the lease had expired, his suit would have been different from the present proceeding. It may further be observed, that such a suit would have been very different from any other of which we have experience in this Court. As there was no probability of renewal, the Plaintiff must have sued for a compensation, the amount of which could not be estimated,—for damages which could not in any ordinary or known course of proceedings be assessed. A calculation of the value of the life on the estate must have been made, and according as that estimate made it expire sooner or later in the seven years, more or less must have been added to the fourteen; then the present value must have been taken of that sum deferred to the period of the calculated death; and after an amount should thus have been obtained, the party called upon to pay it, might by living far beyond the calculation, have shewn to demonstration that he had paid too much. It may safely be asserted, that calculations of this kind are never resorted to by courts of justice, unless when the events have been such as to prevent the possibility of the fact falsifying the estimate. But if the suitor should only for the present be allowed what he might be said to have a right to at the last, viz., the fourteen years, still the period at which he should receive it must be taken into the account and affect the calculation, and besides, he must be told to depart and come again for the residue of his remedy, when the tenant for life should really die.

Surely it is not upon the suggestion of such a proceeding as this having been open to the party, that we are to hold him barred by laches of his present remedy, clearly defined and well known, and easily and constantly administered; a remedy, in truth, of a different kind from that which he is blamed for not seeking earlier.

Decree affirmed.

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WRAY v. HUTCHINSON.

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L. C.
1854.

Nov. 17. 21.

THE Plaintiff and Defendant had entered into a partnership for a term of twenty-one years as surgeons and apothecaries. The bill prayed a dissolution of the partnership upon the alleged ground of misconduct on the part of the Defendant in the partnership concerns. After the Defendant had answered the original bill, the Plaintiff amended his bill, introducing at great length, and with much minuteness of detail, additional matter of complaint against the Defendant. The Defendant put in an answer to the amended bill, in which he stated, at equal length, matter of justification against the new complaints, and concluded his answer, by stating that the new matter, alleged in the amended bill, referred to transactions which had taken place subsequently to the filing of the original bill, and he insisted upon the same advantage with respect to that objection, as if he had demurred or pleaded thereto. The Plaintiff replied to the answers, and evidence of great length was entered into on both sides, with respect to the whole matter of the original and amended bills.

A Plaintiff may by amended bill introduce new matter which occurred prior to filing the original bill, in order to fortify his case, but he cannot introduce new matter which occurred subsequently to the filing of the original bill, without a supplemental bill; and the Defendant having in his answer to the amended bill stated this objection to the new matter, and insisted upon the same advantage as if he had demurred or pleaded thereto, and the

After the bills and answers had been opened by Mr. *W. C. L. Keene* on the part of the Plaintiff, and by Mr. *Bichner*

Plaintiff not being able to support his case upon the evidence which referred to the allegations of the original bill, the bill was dismissed with costs.

Where a bill contains scandalous imputations on the character of the Defendant, the Defendant will not subject himself to the payment of costs by answering such imputations, although he objects at the same time to the introduction of the matters so answered on the ground of irregularity in point of pleading.

The Court will not decree a dissolution of partnership, unless it be shewn that the Defendant has substantially failed in the performance of his part of the partnership agreement; it is not the office of a court of equity to enter into the consideration of mere partnership squabbles.

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Bichner on the part of the Defendant, and after the Plaintiff's case had been stated by Mr. *Kindersley*, evidence was proposed to be read in support of the allegations contained in the amended bill;

Mr. *Bickersteth*, on the part of the Defendant, objected that no evidence was admissible except as to matter which had occurred prior to filing the original bill. Matter, which had occurred subsequently to the filing of the original bill, should have been brought before the Court by a supplemental bill, and not by way of amendment to the original bill.

Mr. *Kindersley* admitted that matter which had occurred subsequently to the filing of the original bill, was properly the subject of a supplemental bill; but he contended that the Defendant had, by answering the amended bill, waived the irregularity, and could not now take the objection at the hearing: *Redesdale's Treatise on Pleading*. (a) In *The Archbishop of York v. Stapleton* (b), Lord *Hardwicke* after stating the rule that the Plaintiff could not properly amend his original bill by introducing new matter which had arisen since the original bill, but ought to have brought a supplemental bill, adds, "but then the Defendants should have taken advantage of this defect in form by a demurrer, and it is too late to make the objection after they have answered."

Mr. *Bickersteth* replied that in the case referred to the Defendants were held to have waived the objection because they merely answered without reserving to themselves the same right of taking the objection at the hearing as if they had pleaded or demurred. Here the

Defendant

(a) p. 290. 4th edit.

(b) 2 *Atk.* 136.

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Defendant had expressly taken the objection in his answer, and had insisted upon the same benefit as if he had put in a plea or demurrer.

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The MASTER of the ROLLS allowed the objection, and directed the Plaintiff's counsel to confine themselves to the evidence in support of the original bill. The Plaintiff had insisted upon his title to the relief prayed in respect of the statements in the original bill, and although he might have fortified his title to the relief prayed by introducing in the amended bill new matter which had taken place prior to filing the original bill, he could not have the benefit of new facts without a supplemental bill.

Upon this decision the Plaintiff's counsel admitted that they could not sustain the Plaintiff's title to the relief prayed, and that his bill must be dismissed; the only remaining question, therefore, was as to the costs of the suit.

For the Plaintiff it was insisted, that as the Defendant had unnecessarily and wantonly entered into an elaborate answer to all the allegations in the amended bill, thereby inducing the Plaintiff to go into expensive evidence under the belief that the Defendant was ready to meet the case upon the merits, whereas the Defendant now insisted upon the irregularity in point of form, it would be unjust that the Plaintiff should be visited with the whole costs of the suit.

On the other side it was argued that, as the Defendant had expressly taken his objection to the irregularity by his answer, and insisted upon the same advantage which he would have obtained by plea or demurrer, the Plaintiff had no pretence for saying that he was taken by surprise;

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surprise; and as to the answer made by the Defendant to the allegations in the amended bill, that amended bill teemed with aspersions upon the Defendant's character, and it was just that the Defendant should be allowed the opportunity of clearing his character upon oath against the calumnies cast upon it by the bill, at the same time that he reserved to himself all the advantage which he would have derived from a plea or demurrer, had he thought proper to plead or demur.

The MASTER of the ROLLS said, he was at first disposed to dismiss the bill without costs, upon the ground that the Defendant ought to have rendered the expensive evidence unnecessary by putting in a demurrer or plea to the amended bill, but looking to the concluding passage of the Defendant's answer, in which he had stated his objection to the amended bill by reason of the introduction of subsequent matter, and had insisted upon the same advantage as he would have obtained by demurrer or plea, and considering further that, as the bill was loaded with scandalous matter, it was not unreasonable that the Defendant should reply to such scandalous matter, though he objected to it, as irregular in point of pleading, he was of opinion that the Plaintiff had incurred the extraordinary expense of evidence in his own wrong, and that the bill must, therefore, be dismissed with full costs. His Honor further observed, that upon the opening of the pleadings he had doubted whether the Plaintiff had stated a case which entitled him to a dissolution of the partnership, for although a partnership would be dissolved in equity if a Defendant had substantially failed in the performance of his part of the agreement, yet it was not the office of a court of equity to enter into a consideration of mere partnership squabbles.

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The Plaintiff having appealed to the Lord Chancellor from his Honor's decision, it was agreed between the parties that the preliminary question upon the point of pleading should be first argued and disposed of, as the decision of the Court upon that point might render it unnecessary to go into any discussion of the merits.

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Sir *C. Wetherell*, Mr. *Kindersley*, Mr. *Wigram*, and Mr. *W. C. L. Keene*, for the Plaintiff.

The principles upon which the judgment of the late Master of the Rolls proceeded in this case are founded in error, and are directly at variance with all authority. The language of Lord *Redesdale* upon this subject is clear and express. Speaking of the defences which may be made by demurrer, his Lordship says, "If an irregularity arises in any alteration of a bill by way of amendment, it may also be taken advantage of by demurrer. As if a Plaintiff amends his bill, and states a matter arisen subsequent to the filing of the bill, which consequently ought to be the subject of a supplemental bill or bill of revivor. But if a matter arisen subsequent to the filing of the bill, and properly the subject of a supplemental bill, is stated by amendment, and the Defendant answers the amended bill, it is too late to object to the irregularity at the hearing." And the origin of this distinction is to be found in the observation added by his Lordship, that, "as the practice of introducing by supplemental bill matter arisen subsequent to the institution of a suit, has been established merely to preserve order in the pleadings, the reason on which it is founded ceases when all the proceedings to obtain the judgment of the Court have been had without any inconvenience arising from the irregularity." (a) In the

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(a) *Redesd. on Pleading*, 207. 4th edit.

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corresponding passage which treats of the various defences that may be made by way of plea, the same doctrine is laid down in equally express terms. "If a bill is amended by stating a matter arisen subsequent to the filing of the bill, and which consequently ought to have been the subject of a supplemental bill, advantage may be taken of the irregularity by way of plea, if it does not sufficiently appear on the bill to found a demurrer; but if the Defendant answers, he waives the objection to the irregularity, and cannot make it at the hearing." (a) The case of *The Archbishop of York v. Stapleton* (b) is a direct authority for the same doctrine, which is also strongly supported by the language of Sir Thomas Plumer in *Knight v. Matthews*. (c) The rule requiring subsequent matter to be introduced upon the record, not by amendment but by a supplemental bill, was established to preserve regularity in the pleadings, and solely for the convenience of Defendants: if, therefore, a Defendant chuses notwithstanding to answer the amendments and allow the suit to proceed to a hearing, he will not be then permitted to turn round and rely upon an irregularity which is one of mere form, and which by his own conduct he has waived. In this respect the objection stands on the same footing with that of multifariousness, an objection which can never be successfully taken at the hearing.

Sir Edward Sugden, Mr. Knight, Mr. Cooper, and Mr. Bichner, for the Defendant.

Neither the passages cited from Lord Redesdale's treatise, nor the observations of Lord Hardwicke in *The Archbishop of York v. Stapleton*, have any application; for they refer exclusively to cases where the objection

(a) *Redesd. on Pleading*, 290.
 4th edit.

(b) 2 *Atk.* 136.

(c) 1 *Mad.* 566.

jection has been taken, not as here by the answer itself, but *after* the answer, when the suit has come to a hearing. *Knight v. Matthews* is equally inapplicable; for there the subsequent matters, introduced by amendment, had been first put on the record by the Defendant himself in his answer, from which the Plaintiff afterwards imported them into the statements of his own bill; and, of course, an objection founded on an amendment of that nature could not lie in the Defendant's mouth. It is perfectly clear, besides, that the Plaintiff could obtain no other relief at the hearing, than that to which he was entitled at the time when he filed his original bill. In *Vere v. Glynn* (a), Lord Bathurst, in answer to a remark, that amending a bill put the original bill out of Court, and the proceedings were then on the amended bill, observed, "This cannot be; for the original and amended bill are but one record: the time of filing the original bill is not altered, and it is only amended and written on;—amended by virtue of an order dated on a day specified. A bill of supplement is a distinct record." These principles, which were recognised and acted upon in *Barfield v. Kelly* (b), receive a further illustration from the converse rule, that new matter, which is not subsequent in point of time to the filing of the original bill, can only be introduced by amendment, and not by supplemental bill: *Colclough v. Evans*. (c)

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Sir John Leach never meant in deciding this case to controvert the general proposition laid down by Lord Hardwicke and Lord Redesdale: on the contrary, he fully admitted it; but then, at the end of this answer, he found a passage, stating that the new matter in the
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(a) 2 Dick. 441.

(c) 4 Sim. 76.

(b) 4 Russ. 355.

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amended bill related to transactions which had taken place subsequently to the filing of the original bill, and insisting on the same advantage with respect to that objection as if the Defendant had demurred or pleaded thereto; a circumstance which his Honor considered materially to distinguish the present case. It was, indeed, quite impossible to demur to the amended bill; for though much of the new matter introduced into it by way of amendment was posterior in point of time to the filing of the original bill, the Plaintiff has, in inserting such matter, studiously avoided all reference to the dates of the transactions: and it was equally impossible to plead to it successfully, for the original and the new matter are, in the statement, so artfully interwoven and mixed up together, that no pleader, however skilful, could have framed a plea, founded upon that objection, which would not have covered too much, and have, consequently, over-ruled itself. The Defendant, therefore, had no alternative left him but to answer; and that course was especially incumbent on him, in order that he might have an opportunity of meeting and repelling *seriatim* upon oath the many malicious and slanderous allegations which the Plaintiff has thought fit to put on the record in support of his case.

Sir C. Wetherell, in reply.

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The LORD CHANCELLOR made an order dismissing the appeal.

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THIS was a motion, on behalf of the Defendants, that *Henry Browne*, as next friend of the infant Plaintiffs, might be restrained from further proceedings in the suit; and that an inquiry might be directed, whether it would be for the benefit of the Plaintiffs, that the suit should be further prosecuted; and if the Master should be of opinion in the affirmative, then that he might appoint some other proper person as the next friend of the infants, to have the conduct of the suit in the place of the said *Henry Browne*.

The Vice-Chancellor had refused the application, with costs.

The bill was filed in *January* 1833, on behalf of the four infant daughters and only children of *John Nalder*, by *Henry Browne*, as their next friend, against the two persons who were appointed trustees and executors under *John Nalder's* will, and against *Elizabeth Nalder* his widow. It stated the will of *John Nalder*, which was duly attested, and which, after giving a rent-charge of 70*l.* a year in lieu of dower, as also a pecuniary legacy, and a life interest in his household furniture and effects to his widow, devised and bequeathed his real estate, and his residuary personal property, to the Defendants, the trustees (whom he also appointed his executors), for the absolute benefit of his four infant daughters, equally, with a power to apply the interest of their respective shares towards their maintenance during their minority; and it appointed his said trustees jointly with his widow to the guardianship of the children. The bill stated that the Plaintiffs were

Where a bill has been filed on behalf of infants, under circumstances raising a strong suspicion against the motives of the next friend, the Court will direct an inquiry whether the suit is for the benefit of the infants, and if so, whether such next friend is a proper person to conduct it, or otherwise, who is a proper person to be appointed next friend in his place.

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of the ages of eleven, seven, and three years, and nine months, respectively. It charged that the will had been proved by the widow and one of the executors only, *Thomas Hawkins*; that *Waldron*, the other executor and trustee, resided at a considerable distance from the testator's property, and did not intend to interfere actively in the administration of the trust; that his co-executor and co-trustee, *Hawkins*, was in narrow and limited circumstances; and that the interests of the Plaintiffs would be endangered, if any considerable part of the testator's property were allowed to come into his hands; that the widow was bound, but had refused to elect between her dower at common law and the benefits given her by the will; that the Defendants pretended that, shortly previous to his death, the testator had entered into some agreement for letting on lease the whole, or a large portion of his freehold lands, and they threatened to carry that agreement into effect; but that if such agreement had ever been entered into by the testator, he was not at the time competent to transact business.

The bill prayed that the testator's will might be established, and the trusts thereof carried into effect; that the usual accounts of his debts, and funeral and testamentary expenses, and also of his personal estate, and of the rents and profits of his real estates might be taken, and, if necessary, part of such real estate might be sold to satisfy his debts; that the Defendant the widow might elect between her right to dower at common law and the benefits given her by the will; that an allowance might be made for the maintenance of the Plaintiffs; that a receiver might be appointed of the outstanding personalty and of the rents and profits of the real estate; and that the Defendants, the executors and trustees, might be restrained from getting in such outstanding personalty and collecting such rents.

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The affidavits, made by the different Defendants in support of the motion, positively denied all the charges in the bill, with respect to the trust funds being in danger, the straitened circumstances of one of the trustees, the intention imputed to the other not to act, and the testator's alleged incompetency to enter into the agreement. The widow, also, in her affidavit stated, that she had elected to take under the will. It further appeared from the affidavits, that the testator's real estate might be worth, in the whole, between 700*l.* and 800*l.* a year; that the trustees had agreed to let the principal part of it, exclusive of the mansion house and adjoining fields, for a period of ten years, at a yearly rent of 615*l.*; that no member or relative of the family had sanctioned or advised the suit, but that it had been set on foot entirely at the instigation of a solicitor of the name of *Tilby*, who had for many years acted for the testator in his professional capacity, but who had latterly been discarded, and another solicitor of the name of *Phillips* employed in his stead; that a few days before Mr. *Nalder's* death, Mr. *Phillips* was sent for to assist in making his will, and that a will was then actually prepared and executed; that the day after the execution of that will, Mr. *Tilby*, without having been sent for, called upon, and made his way into the room where the testator then lay upon his death-bed, and induced or persuaded Mr. *Nalder* to make and execute another will, which was substantially the same with the former, but which differed from it in not giving such ample powers to the trustees with respect to the management of the property; that the testator afterwards expressed to his brother-in-law and his wife much vexation and anger at his own weakness in having yielded to *Tilby's* importunity and executed this second will, and wished that it should be destroyed and another will prepared by Mr. *Phillips*; that this second will was the one which the bill sought to establish and carry into effect;

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that *Henry Browne*, the next friend in the suit, was of the age of twenty-five, an entire stranger to the family; that he lived at a distance of twelve miles from them, and had no independent property, and had lately held the situation of a farm servant or bailiff at monthly wages; that he was well known to *Tilby*, at whose request he had agreed to act as the next friend of the Plaintiffs in the suit.

The affidavits, filed against the motion, stated some circumstances which gave reason to apprehend that a suit might be necessary, in order properly to protect the interests of the Plaintiffs; but they did not materially alter the facts stated in the affidavits of the Defendants.

No other bill had been filed for the purpose of carrying into effect the trusts of the testator's will.

Sir *E. Sugden* and Mr. *Hayter*, for the motion, contended that upon the facts stated in the affidavits, a case of abuse was disclosed which called for a summary and decisive remedy. The institution of the suit was a most unjustifiable attempt to subject a widow and her fatherless children to the expensive interference of the Court of Chancery—an interference which, however useful on many occasions, was here perfectly wanton and unnecessary, and could have no other object or effect, than to transfer a portion of the moderate fortune to which these Plaintiffs were entitled, into the pocket of Mr. *Tilby*, the real Plaintiff in the cause. If such a suit were suffered to proceed, the Court would in fact sanction any rapacious solicitor who had been disappointed in his expectations of employment from executors, in hunting out some needy dependent, who would allow his name to be used as a next friend, and then, under pretence of protecting the rights of infants, and without waiting for a case of suspicion against those whom the

testator

testator had appointed for that purpose, putting a bill upon the file, and thus bringing those infants and their property under the expensive machinery of this Court. *Richardson v. Miller* (a) was an express authority for the present application.

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Mr. *Pepys* and Mr. *James Russell*, *contra*, submitted, that there was enough upon the face of the will itself, and upon the circumstances disclosed by the counter affidavits, to shew that the testator's estate could not possibly be administered, or the interests of the Plaintiffs sufficiently secured, without the assistance of a suit. This was the only bill upon the file relative to the testator's estate; and no one had denied, that it was a bill properly framed to attain all the objects which it professed, and which the state of the family and property required. Instead of discouraging, it had been the uniform practice of the Court rather to encourage and give facilities to persons who sought to throw the protection of a suit around parties whose infancy incapacitated them from acting for themselves; and the Court therefore would not curiously inquire into the circumstances and station in life of persons, who placed themselves in the important and responsible situation of next friends. *Davenport v. Davenport*. (b) *Pennington v. Alvin*. (c) *Stevens v. Stevens*. (d)

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It is undeniable that the habit of the Court has been to encourage persons to come forward as next friends, for the purpose of obtaining its aid in behalf of parties inca-

(a) 1 *Sim.* 133.

(c) 1 *S. & St.* 264.

(b) 1 *S. & St.* 101.

(d) 6 *Mad.* 97.

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incapacitated to sue for themselves. The language of the books is frequently, that next friends should not be discouraged; but there are cases which go much further, both in their language and in their tendency; cases which, both by the words used, and the things done, give great encouragement to undertake the office. In *Whittaker v. Marlar* (a), Lord *Thurlow* says, that "Whoever will stand forward in that character, is to be encouraged to every possible extent, while he can be supposed to intend the infant's benefit." This seems to go as far as possible; it is as much as to say, that any one may do what he pleases as next friend, until he does something which cannot by any possibility be supposed to be done *bonâ fide* for the infant's advantage. It must however be observed, that this is rather the language of the case than the point decided; for there the Court, on a full review of the circumstances, dismissed the bill, and made the next friend pay the whole costs of that proceeding and of the application. But it had been referred to the Master to inquire whether or not the suit was necessary, and he had reported against it; and the book does not state the facts upon which the report and the decision are grounded.

The encouragement has been extended still further in later cases. Lord *Thurlow*, in the one cited, held that no degree of mistake or apprehension would entitle the Court to fix a next friend with costs. But in *Davenport v. Davenport* (b), the Court refused to inquire into the circumstances of a party proposed as next friend, on the ground that after one was removed another might file a bill as of right without any inquiry. Nevertheless it is clear that the Court always expects a next friend to be a person of substance, and so it was held by

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(a) 1 *Cor*, 285.

(b) 1 *S. & St.* 101.

Sir *J. Jekyll* in a case at the Rolls in 1737 (*a*); and if such is the expectation, that is, the just expectation of the Court, it might never be fulfilled were no steps competent to be taken for the purpose of insuring it. Yet the language of the report of a late case, *Pennington v. Alvin* (*b*), would even give reason to suppose that if a person notoriously pennyless, who had seduced the infant's mother, been for months in execution on the suit of the husband and father for adultery, and taken the benefit of the Insolvent Act, had come forward as next friend of the infant, and not of the mother, the Court would hardly have made him find security for costs.

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The true and the just principle which should govern all such cases is this. No discouragement ought to be thrown in the way of persons *bonâ fide* suing as next friends; but no undue facility should be given to mere volunteers, who interfere rather for their own purposes than for the infant's advantage. While they appear to act *bonâ fide* they will be protected; the presumption will rather be in their favour; the proof will rather be thrown upon those who impeach their motives; the leaning will be more for than against them. But no strained presumptions will be made to protect them; no forced constructions will be put on their conduct; no benefit from bare possibilities will be conjured up in their behalf. They must be content to have their motives appreciated and their acts judged like other parties. If they have involved themselves in suspicion, their proceedings must be subjected to inquiry; if they have incurred just blame, be it by improper interference, or be it by unnecessary interference, they must abide the consequences; the suit at their instance must be stayed;

or

(*a*) 1 *Atk.* 570.

(*b*) 1 *S. & St.* 265.

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or if the suit be useful to the infant, but the parties instituting it be unfit to conduct it, they must give place to others in whom the Court can better repose confidence.

It follows that every such case must depend upon its circumstances; nor will the Court even order an inquiry unless just cause of suspicion exists. In the present case the circumstances are of a very peculiar aspect. This is not the suit of *Browne*, the nominal next friend, any more than it is mine. It is the suit of Mr. *Tilby*, an attorney. I do not, for that reason, either blame Mr. *Tilby*, or decide that the suit is needless, or even deny that it may be beneficial; but I state this as a thing calculated to point the particular attention of the Court towards the whole of the other circumstances of the case. These are such as to excite very watchful attention; they give birth to suspicion enough to call for full inquiry; and I feel that I should not discharge my duty in protecting the interests of these infants, if I did not send the whole matter to the Master. But I shall direct the inquiry to be not only as to the suit being for the benefit of the infants — and, if it be, as to the proper persons to conduct it in case the present next friend be removed — but the Master must also inquire whether or not *Henry Browne* is a fit and proper person to be continued the next friend; and he is to have leave to report special matters.

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ROLLS.
Nov. 15.
L. C.
June 7.
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THE bill was filed for the specific performance of an agreement, under the following circumstances. The Plaintiff, *James Fielder Croome*, being seised of an estate in fee, called the *Leigh* estate, and the Defendant, *Thomas Lediard*, who was a solicitor, claiming to be entitled to the reversion in fee of an estate called *Haresfield*, *Croome* agreed to purchase the *Haresfield* estate, at such price as the same should be appraised at by *Daniel Trinder*; and *Lediard* at the same time agreed to purchase the *Leigh* estate, at such price as that estate should be appraised at by the same surveyor; and a memorandum to the following effect was reduced into writing by *Lediard*, and executed by both parties:—
“Memorandum of an agreement made this 30th of May 1832, between *James Fielder Croome*, of *Cheltenham*, Esq. of the one part, and *Thomas Lediard*, of *Cirencester*, Gentleman, of the other part. The said *James Fielder Croome* agrees to sell, and *Thomas Lediard* agrees to purchase, the inheritance in fee-simple in possession of all that messuage, tenement, or farm house, lands, and hereditaments situate at the *Leigh*, in the parish of *Ashton*, at such price or sum as the same shall be appraised at by *Daniel Trinder*, of *Norcott*, land surveyor; the timber now growing thereon to be valued by the said *Daniel Trinder* and paid for accordingly. And the said *Thomas Lediard* agrees to sell, and the said *James Fielder Croome* to purchase, the inheritance

By a written agreement between the Plaintiff and the Defendant, the Plaintiff agreed to sell, and the Defendant agreed to purchase, upon the terms stated, a certain property called the *Leigh* estate; and by the same agreement the Defendant agreed to sell, and the Plaintiff agreed to purchase another estate, called the *Haresfield* estate; and it was not expressed that the two contracts were to be dependent on each other. The Defendant was eventually unable to make a good title to the *Haresfield* estate: Held, that the Plaintiff was entitled to a

specific performance of the contract as to the *Leigh* estate.

Evidence *aliunde* was not admitted, to shew that it was the real intention of the parties that the agreement should take effect on the basis of a mutual exchange.

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in fee-simple of all that freehold estate situate at *Haresfield*, in reversion after the death of *Charles Neale*, of *Nailsworth*, at such price or sum as the same shall be appraised at by the said *Daniel Trinder*, the timber now growing thereon to be valued by the said *Daniel Trinder*. And it is agreed that the said *Thomas Lediard* shall have possession of the estate at the *Leigh* as from *Lady-day* last. And it is agreed that each party shall at his own expense make out a good and marketable title to his estate, excepting, as to the said *James Fielder Croome*, it is agreed that in the event of his not being able to find the title deeds of his said estate at the *Leigh* now missing, he having made diligent search for the same, the absence of such title deeds shall not affect the performance of this contract, but that the said *Thomas Lediard* shall in such case accept the bond of the said *James Fielder Croome* to indemnify the said *Thomas Lediard* in the event of his eviction from the said estate by reason of any thing in the said deeds contained. The purchases to be completed as at *Lady-day* last, and the said *Daniel Trinder's* charges to be paid equally between the parties. It is also further agreed between the parties hereto, that the absence of the will of the Rev. *Charles Neale* from the evidences of title in the hands of the said *Thomas Lediard* shall not be deemed by the said *James Fielder Croome* as an objection to the title of the said *Thomas Lediard*, but that the said *Thomas Lediard* shall execute a bond to the said *James Fielder Croome* to indemnify him against all adverse claims to be made under or by virtue of the said will by any person whomsoever."

The *Leigh* estate was valued by *Trinder* at 2717*l.*, and *Haresfield* at 1870*l.* On the 5th of *July* 1832, *Lediard* sent to the Plaintiff's solicitors an abstract of his title to the *Haresfield* estate, and he also sent to them

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an abstract, purporting to be an abstract of the Plaintiff's title to the *Leigh* estate, which he had procured from another solicitor. *Croome's* solicitor, having recovered the title deeds of the *Leigh* estate, corrected the abstract sent by *Lediard*, which was in several respects imperfect, and returned it to him so corrected.

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The Plaintiff's solicitors, finding that the reversion of *Haresfield* had been purchased for a sum of 600*l.*, wrote a letter to *Lediard*, inquiring whether he had acted professionally for the person of whom he had purchased the reversion. *Lediard* declined answering this inquiry, and on the 2d of *October* 1832, he wrote a letter to the Plaintiff's solicitors, stating, that unless the abstract of the title to *Haresfield*, with their observations upon it, was returned on or before the 9th of *October*, he should consider the agreement as null and void. The abstract was not returned at that time, and upon the Defendant insisting that the contract was at an end, the present suit was instituted.

The bill prayed that the Defendant might be decreed specifically to perform his agreement for the purchase of the *Leigh* estate, the Plaintiff being willing and offering, upon the Defendant's making out a good title to the reversion in the *Haresfield* estate, specifically to perform his part of the agreement. The Defendant, by his answer, insisted that the negotiation between him and the Plaintiff, previous to the execution of the agreement, was for an exchange, and not for separate purchases; that when the agreement was reduced into writing, it was understood between the parties that the same was on the footing and in the nature of a mutual exchange; and that the only reason why the memorandum was prepared by way of distinct purchases, was, that it was considered preferable that the same should be carried into

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into effect by separate conveyances, in order to prevent the objections that might be made to one deed of exchange between the parties, especially as the title deeds of the Plaintiff were, at the time of the execution of the agreement, supposed to be lost.

It was admitted at the bar, on the part of the Defendant, that the Defendant could not make a good title to the *Haresfield* estate.

Mr. *Pemberton* and Mr. *Wilbraham*, for the Plaintiff.

The performance of this agreement is resisted by the Defendant, upon the ground that the real intention of the parties was, that one should not purchase, unless he should at the same time sell, although no such intention appears on the face of the agreement. The agreement was drawn by *Lediard* himself; and if it was so drawn as not to indicate the real intention of the parties, can it be doubted that it was expressly so framed, in order that the Plaintiff should, at all events, be bound to purchase *Lediard's* estate? It turns out that *Lediard* is himself unable to perform his part of the contract, but he is able to purchase the Plaintiff's estate; and he cannot be permitted to refuse the performance of that part of the contract by which he is bound to purchase the *Leigh* estate, because he is unable to make a valid sale to the Plaintiff of the *Haresfield* estate. The Defendant, in supposing that he had a right to put an end to the contract because the abstract which he had delivered was not returned to him on a day which he chose to name, altogether mistook the law and practice upon this subject; for the property in the abstract passes from the time of delivery to the intended purchaser, and the vendor is not entitled to it pending the negotiation. Where a vendor contracts to sell a larger interest than he possesses, this is not a ground for rescinding the contract,

contract, if the purchaser choose to hold him to it; but the difference between the interest which he has contracted to sell, and that which he is capable of conveying, is a proper subject for compensation; *Mortlock v. Buller* (a), *Williams v. Edwards* (b). If there be a defect in the Defendant's title, the Plaintiff is ready to accept the title with a proper abatement, provided the defect be of such a nature as may admit of compensation. If the title be incurably bad, the Defendant, being a solicitor, must have known this fact when he entered into the contract, and cannot avail himself of his own wrong for the purpose of avoiding his part of the agreement.

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Mr. *Bickersteth* and Mr. *Whitmarsh*, for the Defendant.

The question is not, whether there has been a breach of the contract for which the Defendant is answerable, for that is not denied; but whether, under the circumstances, this Court will enforce a specific performance of the Defendant's part of the agreement. The basis of the agreement from the outset was an intended exchange of lands, to be carried into effect by mutual purchases and sales; the negotiation was carried on with reference to both estates at the same time, and the agreement for this exchange was entered into by a single instrument. The same person was to make a valuation of both estates; and his single award, after an examination of the two estates, was to be binding upon both parties. How, therefore, is it possible to look at this contract otherwise than as a contract which was to be performed in all its parts, and in which those parts were mutually dependent upon each other? The Plaintiff now, however, says that there were two distinct contracts, and calls upon the Defendant to do something for

(a) 10 Ves. 492.

(b) 2 Sim. 78.

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for which he never contracted. With respect to the notice given by the Defendant, that he should consider the contract at an end, unless the abstract were returned at a given time, it is to be observed that the abstract was delivered on the 5th of *July*, and that the notice was not sent by *Lediard* until the 2d of *October*; and, although time might not be of the essence of the contract, yet some reasonable period must, in all such cases, be fixed at which one party is entitled to call upon the other either for the fulfilment or the abandonment of his agreement.

On the part of the Defendant evidence was tendered, with a view to establish that the real intention of the parties to the agreement was to exchange their respective estates; but the Court would not permit this evidence to be read.

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The intention of the parties must be collected from the expressions in the written instrument; and no evidence *aliunde* can be received to give a construction to the agreement contrary to the plain import of those expressions. There is, in this memorandum, a contract on the part of the Plaintiff to sell, and on the part of the Defendant to purchase the estate at *Leigh* upon the terms stated; and there is a contract on the part of the Defendant to sell, and on the part of the Plaintiff to purchase, the estate at *Haresfield*. It is impossible that these agreements can be considered, as is contended on the part of the Defendant, as one entire contract. There are plainly two distinct contracts, which, according to the language used in the instrument, are not made dependent upon each other; and the right of the Plaintiff, therefore, to a specific performance of the agreement

agreement for the sale of the *Leigh* estate to the Defendant cannot be defeated, because the Defendant is unable, on his part, to perform another distinct contract.

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The Plaintiff was declared entitled to a specific performance of the agreement as to the sale of the *Leigh* estate, and a reference as to title was directed. The Court refused the application of the Plaintiff for costs of the suit to the hearing, upon the ground that the Plaintiff might not be able to make a good title to the *Leigh* estate, and would not, in such case, be entitled to costs.

The Defendant appealed from his Honor's decree.

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The Solicitor-General (Sir *Charles Pepys*) and Mr. *Wilbraham*, in support of the decree.

Sir *W. Horne*, Mr. *Preston*, and Mr. *Whitmarsh*, for the Appellant.

There are two points raised upon this appeal; first, whether the construction put upon the contract by the Court below is not, upon the face of the instrument, erroneous; and, secondly, whether, supposing the import of the instrument to be doubtful, it was not competent to the Defendant to call in aid extrinsic evidence to explain the nature of the transaction.

As to the first point it is to be observed, that the contract between the parties is contained in one instrument, with a single stamp, and attested by one witness; and the agreement stipulates that each of the parties shall be a buyer and a seller, the direct inference from which stipulation is, that one party shall not be compelled to buy unless the other is in a condition to sell.

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The parties were desirous of effecting an exchange of their respective estates; and as it seldom happens, in transactions of this nature, that two estates are of exactly the same value, the difference, in point of value, was to be made the subject of pecuniary compensation: and the same valuer of both estates was employed by both parties, who were to bear the expense of the valuation in equal proportions. The whole treaty proceeded upon a basis of mutuality; and, as no fraud or want of good faith is imputed in this case to the Defendant, the Plaintiff has no pretence, in a court of equity, for insisting upon the specific performance of one half of the agreement, while the other half of it remains unfulfilled.

But if there were any doubt, upon the terms of this instrument, as to the nature of the contract between the parties, the evidence tendered by the Defendant to rebut the Plaintiff's equity was improperly excluded. The distinction between the situation of a plaintiff and a defendant in a suit for specific performance, in respect of the right of resorting to parol evidence, was not adverted to in the Court below. A plaintiff in a suit for specific performance has no right to call in aid extrinsic evidence to support his equity; but the defendant may resort to parol evidence to rebut the plaintiff's equity, and shew that the plaintiff has no title to relief in this Court. In *Clarke v. Grant* (a), this distinction was recognised; and the defendant was allowed to give parol evidence of a stipulation, the effect of which was to alter the terms of the written agreement. Sir *William Grant* there says, "It has been ruled that it is not open to a plaintiff to alter or correct the terms of a written agreement by parol. But it has never been deter-

(a) 14 Ves. 519.

determined that a defendant may not set up a parol engagement in opposition to a plaintiff who, having entered into it, seeks to have a written agreement specifically performed independently of it."

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The LORD CHANCELLOR said, he was so clearly of opinion that the decision of the court below, upon both points, was right, that he should not call upon the counsel for the Respondent to reply. The agreements for the sale and purchase of the respective estates by each of the parties, though contained in the same instrument, were manifestly distinct and several agreements, which were wholly independent of each other. Except the mere accidental circumstances, that the agreements were written on the same piece of stamped paper, and attested by a single witness, there was nothing to connect the two transactions. The estates were not conterminous in point of situation, nor connected in point of enjoyment; they were wholly several in point of title, and so little ground was there, upon the face of the transaction, for the allegation that the contract was founded upon the basis of an exchange, that the value of one estate was nearly one third greater than that of the other.

There was this peculiarity, which distinguished the present case from most of the cases bearing upon this subject, such as *Poole v. Shergold* (a), *Knatchbull v. Grueber* (b), *Dalby v. Pullen* (c), *Price v. Price* (d), *Casamajor v. Strode* (e), that, whereas, in those and similar cases, the question was between a vendor on the one side, and a purchaser on the other, in this case, each of the parties filled at the same time the character both of seller and

(a) 2 Bro. C. C. 118. and 1 Car.
275.
(b) 3 Mer. 124.

(c) 3 Sim. 29.
(d) 1 Sim. & Sta. 586.
(e) 2 Swan. 547.

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and buyer. Questions had been raised in some of the cases referred to, whether the purchaser of several lots was bound to take some lots to which a good title could be made, where there were other lots to which a good title could not be made; but there was no case which afforded any colour for the proposition, that a purchaser could be let off from his contract as to one estate, because he was unable to complete a contract which he had entered into with the vendor for the sale of another estate. Cases might undoubtedly be supposed, in which two transactions might be so complicated together that, when they were made the subject of contract in one, or even in two different instruments, a purchase by one party should not be binding, unless a sale to the vendor should also be completed. Where two estates were conterminous, or where there was a mixed use and enjoyment of the estates, as in the case of one of the parties having an easement over the property of the other, a contract depending upon such mutuality as to sale on one side and purchase upon the other might well exist; but there were no such circumstances in the present case.

What effect the extrinsic evidence tendered by the Defendant in the court below might, if admitted, have had in explaining the intention of the parties, it was unnecessary to consider; because he was clearly of opinion that such evidence was not admissible. It had been argued that, although evidence of matter *dehors* was not admissible for the purpose of raising an equity, it might be given for the purpose of rebutting an equity, and that, therefore, it was competent to the defendant in a suit for specific performance to avail himself of such evidence, though it was not competent to the plaintiff to do so. The distinction was sound within certain limits, and within those limits the rule might be safely adopted. Parol evidence of matter collateral to the agreement
 might

might be received, but no evidence of matter *dehors* was admissible to alter the terms and substance of the contract. In *Clarke v. Grant* (a), the parol evidence admitted was of a stipulation entered into by the defendant prior to, and as a condition precedent to the execution of the agreement. There was an express promise, on the part of the plaintiffs, antecedent to the execution of the agreement; and "but for that promise," observes Sir *William Grant*, "the agreement would probably never have been made." It was observable, moreover, that the stipulation of which parol evidence was admitted in that case did not seek to vary the substance of the agreement; on the contrary, it was a stipulation that "such alteration should be made in the memorandum of agreement as should be consistent with, and agreeable to the substance thereof." In the present case, the purpose for which the parol evidence was tendered on the part of the defendant was, not to enforce a collateral stipulation, but to shew that the transaction was conducted on the basis of an exchange; a circumstance which, if true, was totally at variance with the language and plain import of the instrument. Nothing could be more dangerous, than to admit such evidence; for if the agreement between the parties were in fact conducted upon the basis of an exchange, why was the instrument so drawn as to suppress the real nature of the transaction? In every view of this case, his Lordship was clearly of opinion that the decision of his Honor must be affirmed.

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(a) 14 *Ves.* 519.

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A husband, before making his will, transferred two sums of 4 per cent. and 5 per cent. stock, then forming the whole of his funded property, into the joint names of himself and his wife. By his will he gave the rents of his leasehold houses and the interest of all his funded property or estate of whatsoever kind, upon trust for his wife for life, and, after her decease, upon trust to pay divers legacies of 4 per cent. stock, the aggregate

THOMAS CASS, who was then possessed of 2500*l.* four per cent. Bank annuities, and 2000*l.* five per cent. Bank annuities, standing in his own name, in *October* 1811 and *February* 1812 transferred those respective sums into the joint names of himself and his wife. On the 9th of *July* 1814 he made his will, whereby he bequeathed his four leasehold houses therein particularly described, "and all the rents and proceeds of the aforesaid four houses, together with all the interest of all my funded property or estate of what kind soever, or wheresoever the same or any part thereof may be found," to *Samuel Dummer* and *William Thomas Sweet*, upon trust to "pay the net rents and issues of the aforesaid four houses and premises, and also the interest, proceeds, and profits of all my funded property, and all my estate of whatsoever kind," as the same should become due, to his wife *Mary Cass*, for her own sole use and benefit for her life. The testator proceeded to give to his nephew *Joseph Pitcher*, senior, after the decease of his wife, "the sum of 300*l.* stock four per cent.," together with one of his leasehold houses ;

amount of which fell short by 50*l.* only of the amount of stock of that description, so formerly transferred by him. He afterwards made some further purchases of 5 per cent. stock, taking the transfers in the joint names of himself and his wife, and died in her lifetime, leaving no funded property except the 4 per cents. and 5 per cents. before mentioned; exclusive of which, his assets were wholly insufficient to pay his legacies: Held, first, that all the sums of stock then standing in the joint names of the husband and wife, and whether transferred before or after the date of his will, became, by survivorship, the absolute property of the wife; secondly, that the will did not purport to dispose of the stock in terms sufficiently distinct and explicit to put the wife to her election.

houses; to his nephew *Joseph Pitcher*, jun. "the sum of 300*l.* stock four per cents.;" to his great-nephew *William Pitcher*, "the sum of 300*l.* stock four per cents.;" to his great-niece *Mary Boyden Bevis*, "the sum of 300*l.* stock four per cents.;" to his niece *Mary Buren*, "the sum of 200*l.* stock four per cents.;" to his niece *Sarah Giddings*, "the sum of 200*l.* stock four per cents.;" to his sister in law *Margaret Webb*, "the sum of 200*l.* stock four per cents.;" to his two sisters-in-law *Ann Morton* and *Margaret Webb*, an annuity of 50*l.* each, to be paid them out of his estate by half yearly payments of 25*l.* to each of them, and the survivor of them to have the whole annuity of 100*l.*; and after the death of both his sisters-in-law, the testator directed that one moiety of the principal sum of 2000*l.* from which the annuity of 100*l.* proceeded, should be given to the children of his niece *Mary Ann Dummer*, or their heirs, share and share alike, and the other moiety of the aforesaid principal sum of 2000*l.* to the children of his nephew *Joseph Pitcher*, senior, by his first wife, share and share alike, or to their heirs in like manner. The testator also gave "the sum of 500*l.* stock four per cents." to his great-nephew *Thomas Cass Pitcher*, with a proviso that if *Thomas Cass Pitcher* should die single or without issue, the said sum of 500*l.* should be equally divided between *Thomas Cass Pitcher's* two brothers and his sister, and the survivors and survivor of them, or their heirs or assigns. He also gave to his niece *Mary Ann Dummer*, another of his leasehold houses after the death of his wife *Mary Cass*; to his brother-in-law *Richard Webb*, "the sum of 100*l.* four per cents.;" to his godson *Thomas George Law*, "the sum of 50*l.* stock four per cents.;" to his trustees the sum of 200*l.* upon trust for the benefit of a charity school in *South Street*, and he gave the sum of 100*l.*, to be paid out of his personal estate, to a charity school at *Knightsbridge*.

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His two other leasehold houses, with all his household goods and furniture, he directed to be sold, and the sum of 50*l.* to be retained by each of his trustees, out of the proceeds, for their trouble in the execution of the trust. All the rest, residue, and remainder of his estate not before willed, he gave to the aforesaid *Thomas Cass Pitcher* and *Mary Ann Dummer*, whom he appointed his executor and executrix.

Subsequently to the execution of his will, and in the months of *November* 1814, *July* 1815, and *May* 1816 respectively, *Thomas Cass* made three further purchases of five per cent. stock, in sums of 200*l.*, 100*l.*, and 100*l.* respectively, all of which he caused to be transferred into the names of himself and his wife jointly. He died in the month of *September* 1817. At that time his personal estate, exclusive of the before-mentioned sums of stock, all of which were then standing in the joint names of himself and his wife, was of very inconsiderable value; together with those sums it was not more than sufficient to pay his funeral and testamentary expenses, his debts and legacies, and to satisfy the trusts of his will.

Upon the death of *Thomas Cass*, his widow was let into possession of the four leasehold houses, the rents of which she continued to enjoy till the leases severally expired. In the year 1824 she, by sale of a portion of the 4 per cents., raised the sum of 500*l.*, and paid it over to *Thomas Cass Pitcher*, who thereupon gave her his promissory note, payable on demand, to secure that sum, with interest at 4 per cent. In *January* 1830 *Mrs. Cass* died, leaving a will; by which she made *Mary Ann Dummer* her general legatee, and appointed *Samuel Dummer* her sole executor. At her death all the before-mentioned sums of stock, except that portion
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of the 4 per cent. stock which she had sold out, remained standing in the joint names of herself and her late husband.

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The original bill was filed by the personal representative and residuary legatee of *Mary Cass*; and it prayed that the stock standing in the joint names of her and her husband might be declared to have become her absolute property by survivorship, and not to be subject to the trusts of her husband's will.

Thomas Cass Pitcher, by a cross bill, sought to have it declared that the funded property, as well the stock purchased before as after the date of the testator's will, was assets for the payment of his legacies; or, if it survived to the widow, that she was bound to elect, and had elected, to take under the will.

The Vice-Chancellor having decided that the stock survived to the widow absolutely, and that she was not put to her election (a), *Thomas Cass Pitcher* appealed from that decision.

Sir *E. Sugden* and Mr. *James Russell*, for the Plaintiffs in the original bill, and in support of the decree.

Two questions are raised upon this appeal. First, whether the sums of stock standing in the joint names of the husband and wife at his death became vested in the wife by survivorship for her own absolute use, or merely as a trustee for the estate of her husband; and, secondly, supposing the former construction to be correct, whether the will put the wife to her election.

Upon

(a) 5 Sim. 35., where the will and the facts of the case are stated more at large.

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Upon the first point it is enough to observe, that the very object of a joint investment of this description is to make the survivor the absolute owner of the fund; that, at law, such an act has this effect, and that, in order to affect the survivor with a trust, it is indispensable to shew declarations of the party by whom the investment is made sufficiently clear to clothe the property in the hands of the legal owner with the alleged trust. As evidence for this purpose, nothing short of contemporaneous acts or declarations can be admitted; *Murless v. Franklin*. (a) In the present case it is not asserted, far less is it proved, that the husband at any time entertained an intention of affecting this stock with a trust. The probability, like the presumption of law, is strongly the other way. The only known fact is, that the bulk of the stock in question was transferred by the husband from his own name into those of himself and his wife jointly; and that, as to some small portions of it which be purchased subsequently he took the transfers in the same form. Even assuming it to be certain that the stock or its purchase-money was originally entirely the husband's, still such a transfer would operate as an advancement to the wife; *Murless v. Franklin*, *Rider v. Kidder*. (b) After that transfer took place, the husband could no longer transfer or dispose of it without her consent and co-operation, and by his death the property survived to her, and was placed, as he unquestionably intended, at her absolute disposal.

Upon the second point, (the only point which the Appellant seriously contested in the Court below,) namely, whether there is enough on the face of this will to raise a case of election, it is necessary to examine with

(a) 1 *Suan*. 13.

(b) 10 *Ves*. 360.; and see *Crabb v. Crabb*, 1 *Mylne & Keen*, 511.

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with minute attention the particular frame and language of the whole instrument. The clause in which the testator gives his residuary estate to his widow for life under the expression, "the interest of all my funded property or estate of whatsoever kind," does not amount to a specific gift of any property whatever; *Parrott v. Worsfold*. (a) It is merely a general residuary bequest, and so the Vice-Chancellor considered it. There is not, in fact, a single specific bequest in any part of this will; subject to the wife's life interest, the whole of the residuary property is disposed of in general pecuniary bequests. It is quite indifferent to the character of a legacy, whether it be of pounds sterling or of so much stock; a gift by will of 300*l.* sterling, and of "a sum of 300*l.* stock 4 per cents.," (the expression used by the testator,) are equally pecuniary legacies; *Roper on Legacies*. (b) But, in order to put the widow to elect, the Appellant must shew that there are, in this will, words which purport specifically to dispose of the identical stock in question. No such words, however, can be found. The bequest of the testator's funded property, a bequest of which the terms would have passed whatever he had possessed at the time of his decease, and, therefore, a mere general bequest, can with no propriety be construed as applying to stock which stood in the joint names of himself and his wife, and which could not, with any correctness of speech, be described as *his* funded property. The testator, after the execution of his will, bought three other sums of stock, which were by his directions transferred, as the former stock had been, into his own name and his wife's jointly. It is clear that he could not have intended to include those later purchases under the description of his funded property; for, at the date of his will, he had

not

(a) 1 *J. & W.* 594.

(b) Vol. i. ch. 3. sec. 5. p. 179. 2d edit.

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not acquired them, and of course they could not then be within his contemplation. He might, indeed, have easily prevented them from becoming his wife's by taking the transfers in his own name alone; but that would have defeated his object, which was, that they, like the larger sums previously standing to the joint account, should vest by survivorship in his widow for her absolute use.

So much upon the will itself. It is perfectly clear, from the language of Lord *Eldon* in *Doe v. Chichester* (a), and from the decision of Sir *W. Grant* in *Jones v. Tucker* (b), that the Court will direct no inquiry into the state of the property, because no evidence on that subject can be admitted in aid of the construction. And if such be the law in cases relative to the execution of powers, *a fortiori* must it be the law in a question touching the operation of a will upon a subject-matter in which the testator possessed neither property nor power. Upon a question of election, indeed, it is settled that the Court is not entitled to look beyond the four corners of the instrument; *Brodie v. Barry* (c), *Webb v. Honnor*. (d)

The Attorney-General (Sir *W. Horne*), Mr. *Bligh*, and Mr. *Rudall*, for the Appellant, *Thomas Cass Pitcher*.

The question whether the widow did or did not take the stock as a trustee, is one that depends partly upon the acts done by the husband with reference to the stock, and partly on the subsequent conduct of the parties as explanatory of their intentions. The mere act of transferring the fund from his own name into that of his wife jointly with his effected no change in the property; till the

(a) 4 *Dow*. 65.

(b) 2 *Mer*. 533.

(c) 2 *V. & B*. 127.

(d) 1 *J. & W*. 352.

the day of his death he retained the entire dominion over it; he might have sold, retransferred, or otherwise disposed of it at any moment, so that the ownership remained virtually unaltered; and his subsequent dealings with the stock, the manner in which he treated it in his will, and the form in which the transfers of the later purchases were taken, abundantly prove that till the last hour of his life the testator fully believed and understood that the stock never ceased to be his. During his life, therefore, the legal as well as the equitable interest in it continued to be vested in him; and the instant he died, his will operated as a binding declaration of trust upon the widow, upon whom by survivorship the legal ownership devolved. The whole of Mrs. Cass's behaviour after her husband's death was strictly consistent with the same understanding, in which it would seem she fully concurred. She was content to receive the yearly dividends of the stock, in which under the will she took a life interest, without attempting to touch the principal itself; she recognized the appellant's claim to a portion of that stock as one of her husband's legatees, and as a matter of accommodation to him, entered into an arrangement for enabling him to anticipate the enjoyment of his legacy; and in the will by which she disposed of her fortune she made not the slightest allusion or reference to any property derived from her husband. *Murless v. Franklin* (a) was the case of an advancement of children, where the presumption drawn by courts of equity from a purchase made by a father in their names is founded on the notion, that the father means thereby to advance those for whom both the natural and municipal law require him to provide. If therefore the legal estate be conveyed, as the father conveyed it in *Murless v. Franklin*, to a child, the inference is, unless it be rebutted by

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(a) 1 Swan. 13.

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by contemporaneous evidence, that the beneficial interest is intended to pass also. But *Murless v. Franklin* can have no application here ; for here the husband continued from the time of the transfers down till his decease to be the legal owner of the property ; and all his acts with respect to it, and among others his disposition of it by will, prove incontestably that he asserted and meant to exercise all the rights of ownership over it. Of this the evidence is ample ; and (although that would not be indispensable in a case like the present), it must also be deemed contemporaneous, since it relates to facts and transactions which took place while Mr. *Cass* was the legal owner of the stock, and before, by his decease, it vested in his wife.

Upon the second point, it is impossible to doubt that the testator affected to dispose of the stock in question by his will. The gift to the widow for her life is not an ordinary pecuniary bequest ; neither is it a general bequest of money in the funds. It is a gift of “ all my funded property,” in language which according to the authorities amounts to a specific legacy. The same property which is bequeathed to the widow for life is, upon her decease, allotted and parcelled out among a great number of legatees ; the total of the 4 per cent. stock legacies which are thus given, fall short by 50*l.* only of exhausting the exact amount of that species of stock standing in the joint names of the husband and wife ; and it is admitted that the testator had no other. In like manner the annuity to the testator’s sister-in-law, followed by the gift over of the principal sum of 2000*l.* out of which that annuity proceeded, referred beyond a doubt to the 2000*l.* Navy 5 per cents. which were standing on a similar joint account. The natural and necessary inference is, that the funded property given to the wife, and the stock given afterwards to the legatees over
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are the same identical subject-matter; and the former bequest being certainly specific, the latter must be specific likewise.

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Upon the point of election, it is unquestionable that evidence may be adduced with respect to the state of the testator's property; *Pole v. Lord Somers* (a), *Pulteney v. Lord Darlington* (b): and where specific bequests are given, the Court, frequently for its own satisfaction, directs inquiries for the purpose of ascertaining what property the testator possessed at the date of his will, or the time of his death, capable of answering those bequests. Indeed, such inquiries are indispensable where the existence or nature of the thing given is disputed. Here, however, it is admitted that there is not, and never was, any funded property upon which the will could operate, except those sums of stock which, at the death of Mr. Cass, were standing in the joint names of himself and his wife; and, having that fact undisputed, we are content rather to rely upon the construction of the instrument itself than upon the result of any inquiry, or the aid of extrinsic evidence.

Upon the whole it is submitted, that this will manifests a plain and unambiguous intent to dispose of the fund in question; that the testator never could have given the legacies of his funded property to his wife, and of the sums in 4 per cent. stock to the legatees over, unless he had meant those legacies to be satisfied out of the stock which he had transferred, and which was then standing to the joint account; that the widow, by not touching the funded property, and not referring to it in her will, shewed that she considered herself as a mere trustee; but if she was not, upon the face of the will coupled with

(a) 6 Ves. 309.

(b) Cited 2 Ves. jun. 521. and 6 Ves. 591.

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with her own conduct, to be considered as holding the property in trust, then that she was bound to elect, and that by enjoying as she did the rents of the leasehold houses while she lived, she has elected to take the benefits given her by the will.

Sir *E. Sugden*, in reply.

Dec. 16.

The LORD CHANCELLOR stated the substance of the will, and observed that the allegation in the cross bill, whereby it was represented that the advance of 500*l.*, made to *Thomas Cass Pitcher* by the widow on his promissory note, was an arrangement entered into between them for payment of the legacy which he claimed to be entitled to under the testator's will, was not supported by any evidence; and that the mere giving of the note precluded such a supposition, if it rested on suggestion merely, inasmuch as the sums did not tally, the legacy being a sum of 500*l.* 4 per cent. stock, while the loan was of 500*l.* sterling. His Lordship then proceeded as follows: —

I agree with the opinion of the Vice-Chancellor upon both points. When an individual effects a purchase of stock in the joint names of himself and his child, or of himself and his wife, the transaction cannot of itself be considered as converting these parties into trustees, *quoad* their interest, for the purchaser whose money has paid the price of the stock. With respect to a child this, I think, is admitted. But it is said that the case of advancement to a child rests upon the peculiarity of the relation, and that the exception shall not be extended to the wife. That distinction, however, is not supported by the authorities. Lord *Eldon*, who, in *Rider v. Kidder*,

Kidder (a), had only expressed the inclination of his opinion, saying, that the relation "would, perhaps, prevail also in favour of a wife," had, apparently, no doubt at all in *Wilde v. Wilde* (b), where his Lordship said, that if a husband purchased stock in the joint names of himself and his wife, it was *primâ facie* a gift to her in the event of her surviving, unless evidence of contemporaneous acts, shewing a contrary intention, were produced. Lord *Hardwicke*, too, in *Stileman v. Ash-down* (c), though he expresses an opinion that the doctrine in favour of advancement of children had gone quite far enough, refers to the case of *Christ's Hospital v. Budgin* (d), for another purpose, indeed, but with the full view of the favour therein shewn to the wife as against volunteers or the heir-at-law, and without any disapproval of Lord *Harcourt's* decision, a part of which he makes the groundwork of his own. It is almost unnecessary to add, that where, as is the case here with respect to the bulk of the stock, the whole standing in the joint names at the date of the will, the transfer into the joint names is a transfer of sums previously standing in the owner's own name, the presumption of intention to give is considerably stronger. Indeed, in *George v. Howard and the Bank of England* (e), Chief Baron *Richards* expressed an opinion, that such a circumstance would be sufficient in the case of a stranger.

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It was further contended, that the circumstance of the testator's power over this *chose in action* continuing after the transfer and up to his death differs this from the

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| (a) 10 <i>Ves.</i> 360. | stated in the note to 10 <i>Ves.</i> 367. |
| (b) 31st <i>July</i> 1823, cited in 2d edit. | |
| 1 <i>Rop. H. & W. Jacob's</i> edit. p. 54. So also <i>Lorimer v. Lorimer</i> , decided by Sir <i>J. Leach</i> , Vice-Chancellor, 11th <i>Nov.</i> 1823, and | (c) 2 <i>Atk.</i> 477. |
| | (d) 2 <i>Vern.</i> 685. |
| | (e) 7 <i>Price</i> , 646. |

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case of advancement to a child. But there is a great fallacy here, as it seems to me. The testator's power may have continued, but in what capacity? As husband, and in the exercise of his marital right. Then, suppose it to be admitted that he might have reduced the stock (a *chose in action*) into possession by having had it re-transferred into his own name during his lifetime, still the argument is not at all advanced, for it is not pretended that any thing was done after the first transfer, the stock standing in the joint names at the date of the will, and at the death of the testator. The husband makes the will, which is said, indeed, not to relate to the stock. But suppose, with a view to this part of the argument, we were to admit that it did; the wife's right would survive nevertheless. I have no doubt whatever, therefore, that the stock survived to the wife; and then the second question arises, with respect to her election.

There is nothing more undoubted in the law than that to make a case of election the intention must appear certainly and clearly, both as to the property assumed to be disposed of, and as to the implied condition to be fulfilled. A person is not, without strong indications of such an intent, to be understood as dealing with what does not belong to him. As for his supposing himself to have rights which he had not, unless that appears plainly upon the face of the will, it would be most dangerous to be guided by any conjecture that may be raised to this effect, or to let in extrinsic evidence in proof of it. "If I was to receive evidence of the testator's fancy, it would introduce a very desperate rule of property in this Court." These were the words of Lord *Thurlow* in a case (*a*) where, nevertheless,
he

(a) *Stratton v. Best*, 1 *Ves.* jun. 285.

he stated that he had no doubt of the answer which the testator would have given, if the question had been put to him as to his intention. I do not, however, feel that I am here called upon to determine whether or not evidence *dehors* the will is admissible in explanation of the testator's meaning, for the purpose of raising a case of election. There is some discrepancy among the cases, one or two of them not being reconcilable with the others, or, I may add, with the established principles of the law. But referring to those others, and to the observations of Lord *Kenyon* in *Andrews v. Emmot* (a), and of Lord *Eldon* in *Druce v. Denison* (b), *Pole v. Lord Somers* (c) in this Court, and in *Doe v. Chichester* (d) in the House of Lords, I entertain the strongest opinion that the rules of law are against its admissibility. Its admission here, however, would not decide the question.

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 v.
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Has the Court any right to say, upon this will, that the testator has given the stock, which, it has been proved, was not his own to dispose of? The general gift to trustees, after specifying the leaseholds, is of all the interest "of all my funded property or estate, of whatsoever kind, or wheresoever the same or any part thereof may be found." This of itself is sufficiently general, and extends to every thing else as well as to funded property. But that this generality was clearly in his intention is equally plain from the whole scope and character of the instrument, as from the particular language of the gift to the trustees. The will begins by bequeathing the several leasehold houses therein described, and then come the general words about funded and other property, with which the bequest concludes. The stock legacies are all general; "the
 sum

(a) 2 Bro. C. C. 297.

(b) 6 Ves. 585.

(c) 6 Ves. 309.

(d) 4 Dow. 65.

1899.

 DONAHUE
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 FITCHER.

sum of so much," and "such a stock." Thus the one in question is, "I give the sum of 500*l.* 4 per cents. to my great-nephew;" and if he die single, or without issue, the said sum of 500*l.* is to go over to his brothers and sister.

There is nothing here to make it clear that the testator was dealing with the stock already purchased, or which should thereafter be purchased. On the contrary, the legacy is plainly, by all the rules on the subject, a general one. But it is contended, that in deciding upon the character of the ulterior legacies, the Court must refer to the preceding general gift to the trustees, and to the life interest given to the widow, after whose decease those legacies are to take effect. This only brings it back to a clause of a nature as general,—“all my funded and other property.” There is nothing to justify the Court in holding that the testator thereby intended to give what was not his own; namely, the stock in which his wife had the interest by survivorship, not to be defeated by his will. Very possibly the Court may surmise, as Lord *Eldon* did in *Judd v. Pratt* (a), that, had he been asked the question, he would have said that the stock was his, and that he intended to deal with it as such. But he has not made that intention clear where it ought to be shewn,—in his will.

The bearing upon this question of the cases relative to the execution of powers appears to be all one way, if regard be had to the well-established distinction between personal and real estate. Where a testator has no real estate save the one comprised in the power, a general devise will operate as an execution, on the ground that there is no other way of satisfying the
 words

(a) 13 *Ves.* 168.

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words of the devise except by supposing the deviser to have had the power in his contemplation; and upon that principle *Standen v. Standen* (a) and other cases were decided. But a will of personal estate looks forward to the testator's death, and acts upon what he may then have as well as on what he has at the date of the will; and, therefore, general words, though large enough to cover the personalty subject to the power, are held not to be an execution of the power; for there is no necessity, as in the case of realty, to suppose that the testator intended to execute of the power merely because he had no other personalty at the time: he must be taken to have looked forward, and to have bequeathed all that his will can affect. These points are so well established, that one is only apprehensive of seeming to consider them as unsettled by referring to the cases, all of which are perfectly clear and consistent, from *Andrews v. Emmot* (b) downwards, to *Jones v. Tucker* (c), in which Sir *William Grant* admitted that there could be no reasonable doubt of the intention to execute the power, but yet held himself bound by the rules of law, and precluded from looking out of the will to the state of the personal property at its date.

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DUMMER
PITCHER.

In this instance the testator may have intended to dispose of personal funds to be afterwards acquired; and, therefore, the Court is not driven to assume that he was speaking of such stock as stood in the joint names of himself and his wife at the time when the will was made.

(a) 2 *Ves.* jun. 589.

(c) 2 *Mer.* 555.

(b) 2 *Bro. C. C.* 297.

1834.

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Jan. 31.

NORWAY v. NORWAY.

A person named a trustee in a deed, who declines to accept the office, is in the situation of any other Defendant against whom a bill is dismissed, and can only have his costs as between party and party.

IN this case a person who was named a trustee in a deed, but who had not executed that deed or in any manner accepted the trust, and who by his answer altogether declined it, had been made a Defendant in the suit.

A question was made, upon the bill being dismissed as against the Defendant, whether he was entitled to his costs as between solicitor and client; and a former case of *Sherratt v. Bentley (a)* was referred to, in which such costs had been given.

It was stated by Mr. *Pemberton* that the case referred to could not be considered as of much authority; for the question, though one of great importance in practice, had been there decided after a very slight discussion at the bar; and as the objection was not strongly pressed, the deliberate attention of the Court had not been called to the point.

Mr. *Koe*, Mr. *Piggott*, and Mr. *Bigg*, for different parties in the cause.

The MASTER of the ROLLS.

Being now called upon to give a formal decision upon this point, I must declare that a person named as trustee in a deed, who declines to accept the office, is in the situation of any other Defendant against whom a bill is dismissed; and it would be against the common principle of the Court that he should have his costs as between solicitor and client.

(a) 1 *Russ. & Mylne*, 635.

1833.

MADDEFORD *v.* AUSTWICK.

1835.
Nov. 22.

AUSTWICK *v.* MADDEFORD.

FROM the decrees made in these causes by Sir *John Leach*, when Vice-Chancellor, an appeal was brought by *Austwick*, the Defendant in the original, and the Plaintiff in the cross cause. The general nature of the questions raised in the two suits, and the circumstances out of which they arose, are stated in his Honor's judgment, which is reported in 1 *Simons*, p. 89.

The LORD CHANCELLOR affirmed both the decrees of the Court below. Dec. 16.

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1834.
Jan. 27. 31.

EASTWOOD v. GLENTON.

It is consistent with the practice of the Court, (though such practice is inconvenient, and may require to be amended by a general order,) that an *ex parte* order, obtained upon petition at the Rolls, may be discharged upon motion before the Lord Chancellor.

MR. PEPYS moved for the discharge of an order obtained by the Defendant, upon petition of course at the Rolls, for the taxation of his solicitor's bill of costs.

Mr. Bethell took a preliminary objection to the motion, on the ground that an order made by the Master of the Rolls upon petition could not be discharged upon motion before the Lord Chancellor. The regular course, where it was sought to discharge an order for taxation of a solicitor's bill of costs obtained upon a petition of course at the Rolls, was to present a petition for that purpose to the Master of the Rolls; and upon such petition, where affidavits were filed on both sides, with the view of going into the merits of the case, it was not competent to either party to take advantage of a technical objection: *Crossley v. Parker* (a), *Gretton v. Leyburne*. (b) The order to tax a solicitor's bill, though made as of course, was not a common order involving a mere point of practice, but an order made in conformity with the statute, and could be discharged only by virtue of the same jurisdiction under which it was obtained.

Mr. Pepys, *contra*.

The objection is disposed of by the single authority of *Bishop v. Willis* (c), where Lord Hardwicke recognises the rule that orders made upon petition cannot be discharged upon motion, unless the petition be *ex parte*,
and

(a) 1 Jac. & Walk. 400.
(b) 1 Turn. & Russ. 407.

(c) 2 Ves. sen. 115.

and in that case, he says, it is every day's practice to move for the discharge of such orders. That practice has been uniformly followed from Lord *Hardwicke's* time down to the case of *Clutton v. Pardon (a)*, where Lord *Eldon* discharged, upon motion, an order made as of course by the Master of the Rolls for the taxation of a solicitor's bill of costs; nor can a single direct authority be produced in support of the objection.

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Jan. 31.

A preliminary objection was made to this motion, on the ground that the order, which had been obtained upon petition, of course at the Rolls, could not be discharged, upon motion, in this Court. The cases cited as precedents in support of the practice objected to, were *Bishop v. Willis (b)* and *Clutton v. Pardon. (a)* The former was not an express decision in favour of the practice, as the case on which the order had been made had been obtained after argument by counsel on both sides, but Lord *Hardwicke* recognised the practice of moving to discharge orders made upon petitions of course. In the latter case, an order, as of course, had been obtained for taxation of a solicitor's bill, upon a suppression of the fact, that a former order had, many years before, been obtained for taxation as between solicitor and client. The defendant's solicitor had been paid after a long interval, and he made an offer to deliver up deeds, which was refused. The order was for a re-taxation, which is not of course, and could only have been obtained on suppression of the facts.

I have

(a) 1 *Turn. & Russ.* 301.

(b) 2 *Ves. sen.* 113.

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 GLENTON.

I have found another case, *Jones v. Saxby* (a), where an order of course having been obtained at the Rolls by petition, Lord *Eldon*, on motion, discharged it for irregularity. The order was for time to answer after a demurrer over-ruled, and Lord *Eldon* held it clear that this was a special application. It is probable that there had been a suppression of the fact in the petition, viz. of the demurrer having been over-ruled; but it is also possible that a mistake had been committed by the secretary at the Rolls in taking it for an order of course. If so, this, though not in form, was in substance an appeal, and an appeal from the Judge who signs such an order of course, and who neither hears any party, (there being, indeed, only one party,) nor knows any thing of it. There seems every reason why such applications should be addressed to the Court which made the order, or is supposed to have made it, which ought to protect its officers, and which can best visit the party with whatever penalty his irregular or culpable procedure may deserve. But it is agreed by their Honors, with whom I have conferred, that there is jurisdiction here to entertain such applications, and by way of motion. They are not, indeed, appeals, for there is not properly any order to appeal from: neither are they rehearings, for there cannot, except in contemplation of law, be said to have been a hearing by the Judge below. But the party, on his own statement, obtains what he is entitled to, if his statement be correct, and what, if it be not correct, no other party can be heard to resist; and he makes his statement on his own responsibility, and takes the order at his own peril. Where the order is not on petition, but by motion, that is, by handing in the brief, the party is bound by what is indorsed on it. It is only in a very
 strict

(a) Cited in 1 *Swan*, 194. note.

strict and technical sense that the Court, making such an order, can be said to hear and determine, or to act otherwise than ministerially. Nevertheless the Court may, in contemplation of law, be said so to act.

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 EASTWOOD
 v.
 GLENTON.

But though we are all agreed that there is jurisdiction to discharge such orders here, we think the inconvenience manifest of moving in one Court to discharge such orders made in another; and we have come to the understanding that such applications should not be entertained. Whether or not it may be advisable to make any general order to this effect it is unnecessary to consider; the very rare occurrence of such motions sufficiently shews the sense entertained of their inconvenience, and we have no doubt that the course which we all agree in recommending will be adopted.

With respect to this motion, as it has been made here, it will be disposed of as soon as counsel renew the application upon the merits. (a)

(a) See the following case.

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1834.
ROLLS.
Dec. 4.

LEES v. NUTTALL.

An order made as of course, upon petition at the Rolls, may, if irregularly or improperly obtained, be discharged upon motion before the Master of the Rolls.

An order for the taxation of an agent's bill cannot be obtained as of course by a solicitor, nor can the rule for bringing the amount of the agent's bill into Court, upon such application, be dispensed with except under special circumstances.

THE Defendant, who was a country solicitor, had employed Messrs. *Warner* and *Forster*, as his agents in *London*, previously to the month of *February* 1822, when the partnership between Messrs. *Warner* and *Forster* was dissolved; and in *May* 1823 the Defendant discharged the balance upon bills delivered, and due from him to the partnership firm. The Defendant continued to employ Mr. *Forster* as his agent; and, in *August* 1834, the bills delivered by Mr. *Forster* to the Defendant amounted to the sum of 502*l.* 1*s.* 5*d.* After some correspondence, in the course of which the Defendant, by a letter addressed to Mr. *Forster*, promised to discharge the above-mentioned sum, Mr. *Forster*, in *October* 1834, commenced an action against the Defendant, and notice of trial had been served upon the Defendant for the sittings after *Michaelmas* term. On the 26th of *November* 1834 the Defendant obtained an order, as of course, upon a petition in the cause, for the taxation of the bills delivered by Mr. *Forster*, and also of the bills delivered by Messrs. *Warner* and *Forster*, which had been discharged in 1823, two years before the institution of the suit in which the *ex parte* order was obtained. A motion was now made for the discharge of that order.

Mr. *Pemberton* and Mr. *Parker*, in support of the motion.

The order obtained, as of course, by the Defendant is as irregular as it is incapable of being sustained upon the merits. It is a rule, both at law and in equity, that

that a solicitor cannot apply for the taxation of his agent's bills without bringing the amount of the bills into Court: *Tidd's Practice* (a), *Ostle v. Christian*. (b) The taxation of an agent's bill is not within the act* giving special jurisdiction to the superior Courts over solicitors, and the amount of the bill must be brought into Court, where an order for taxation is made under the general jurisdiction. If it were necessary to go into the merits, the suppression of the facts that the partnership of Messrs. *Warner* and *Forster* was dissolved, and that the bills due on the agency account between that firm and the Defendant had been settled two years before the commencement of the suit, as well as the promise by the Defendant to pay the bills admitted by him to be due to Mr. *Forster*, would render it impossible to sustain this order.

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Mr. *Bethell*, *contra*.

This order having been obtained upon a petition to the Master of the Rolls cannot be discharged upon motion. In *Eastwood v. Glenton* (c), where a motion was made to discharge an order to tax a solicitor's bill obtained upon a petition of course at the Rolls, Lord Chancellor *Brougham*, though he entertained the motion, stated that he had conferred with the Vice-Chancellor and the late Master of the Rolls upon this subject, and that the practice would, in future, be altered. This preliminary objection renders it unnecessary to consider the alleged irregularity, or to support the order upon the merits. The case of *Paget v. Nicholson* (d), however, shews that the rule for bringing the

(a) p. 917.

(b) 1 *Turn. & Russ.* 324.

(c) p. 280. *suprà*.

(d) *Beames on Costs*, 361.

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 {
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the amount of an agent's bill into Court, upon an application for its taxation, is one which the Court will dispense with. The sixth section of the 12 G. 2. c. 13. contains words which exclude the taxation of an agent's bill from the operation of the act * which gives to the superior Courts particular jurisdiction over their officers; but it is doubtful whether that section will apply to the case of a solicitor, party to a suit, who employs another solicitor, as such, to prosecute the suit, and not in the capacity of an agent. But, supposing that case to be within the act of the 12 G. 2. c. 13., no case has ever decided that, under the general jurisdiction which the Court possesses over its officers, a solicitor, party to a cause, may not, upon a summary application, call for the taxation of the bills delivered by a solicitor whom he has employed to conduct his case. With regard to the Defendant's promise to discharge the bills as delivered by *Forster*, that must be taken to be a promise to pay the bills, subject to taxation.

Mr. Pemberton, in reply.

It is the constant practice to move for the discharge of *ex parte* orders made upon petition; *Bishop v. Willis* (a), *Ostle v. Christian* (b), *Clutton v. Pardon* (c); and until that practice shall be altered by a general order of the Court, a mere intimation of its inconvenience, such as appears to have been made in *Eastwood v. Glenton*, cannot affect the right of parties to obtain the discharge of such orders upon motion. As to *Paget v. Nicholson*, the order in that cause was made under very peculiar circumstances; and the question is not whether the rule for

(a) 2 Ves. sen. 115.

(c) 1 Turn. & Russ. 301.

(b) 1 Turn. & Russ. 324.

* 2 G. 2. c. 23. s. 23.

for bringing the amount of an agent's bill into Court upon an application for its taxation may be dispensed with upon a case made, but whether the Court will permit a solicitor to obtain an order, as of course, for the taxation of his agent's bill.

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*The MASTER of the ROLLS.**

The objection taken to the form of this application was made unsuccessfully in the case of *Eastwood v. Glenton*, and there is no authority to support it. On the other hand, there are many cases which shew that it is the constant practice to discharge, upon motion, *ex parte* orders obtained upon petition. It appears from the registrar's minute-book, that in *Binsted v. Barefoot* (a) the common order for taxation was obtained on petition of course at the Rolls, and that on the 17th of July 1746 a motion before Lord *Hardwicke* to discharge that order was refused upon the merits, no objection having been taken as to the form of the application. So in *Barnardiston v. Gibbon*, an order to refer for impertinence, obtained on petition at the Rolls on the 31st of March 1744, was afterwards discharged upon motion before the Lord Chancellor. *Clutton v. Pardon* (b) and *Ostle v. Christian* (c) are recent authorities to the same effect; and there can be no doubt that under the late act † this Court has the same jurisdiction as the other courts of equity with respect to motions.

In a matter so much the same as the taxation of bills of costs both at law and in equity, it is desirable that the same rule should prevail; and the rule at law that,
upon

(a) 1 *Dick.* 112.

(c) 1 *Turn. & Russ.* 524.

(b) 1 *Turn. & Russ.* 301.

* Sir C. Pepys.

† 3 & 4 W. 4. c. 94. s. 24.

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upon an application by a solicitor for the taxation of his agent's bill, the amount of the bill should be brought into Court is recognised by Lord *Eldon* in *Ostle v. Christian* (a) as being equally the rule with respect to similar applications in this Court. In *Paget v. Nicholson* the rule was dispensed with under special circumstances; for as there was a fund already in the hands of the agent, which might have exceeded the amount of his bill, it was unnecessary that the amount should be brought into Court.

In this case the Defendant cannot be heard to say that the bills in question were not agents' bills, because that was the very ground upon which he applied for an order to tax them. The order was obtained upon a suppression of the facts that the partnership between Messrs. *Warner* and *Forster* was dissolved, and the bills due to that firm settled before the suit was instituted: upon the merits, therefore, as well as upon the ground of irregularity, the order for taxation must be discharged with costs.

(a) 1 *Turn. & Russ.* 324.

1884.

CAMERON v. CAMERON.

Dec. 12.

MR. COOPER moved for an order that a *subpœna* might be directed to the proper officer in *Scotland* to be served upon the Defendant, who resided in *Edinburgh*. The suit concerned lands in *England*, and stock in the public funds; and he submitted, that he was entitled to the order under the first section of the act of the 2 & 3 W. 4. c. 33.*, entitled an act for the effect-

The acts of 2 & 3 W. 4. c. 33. and 4 & 5 W. 4. c. 82. for effectuating the service of process issuing from the Courts of Chancery and Exchequer, extend to *Scotland*.

* The preamble and first section of this act are as follows:—

“Whereas great inconvenience and delays of justice arise from the defect of jurisdiction in courts of equity to effectuate the service of their process in such parts of the United Kingdom of *Great Britain* and *Ireland* as are not within the jurisdiction of the said respective courts; for remedy whereof, be it enacted, that from and after the passing of this act it shall and may be lawful for the Courts of Chancery and of Exchequer in *England* respectively, if they shall so think fit, upon special motion of the complainant or complainants in any suit which has been or shall be instituted in such courts respectively, concerning lands or tenements, or hereditaments, situate or being within that part of the United Kingdom called *England* or *Wales*, to order and direct that service in any part of the United

Kingdom of *Great Britain* and *Ireland*, and in the *Isle of Man* respectively, of any *subpœna* or *subpœnas*, letter missive or letters missive, and of all subsequent process to be had thereon, upon any defendant or defendants in such suit then residing in such part of the said United Kingdom or *Isle of Man* in which he, she, or they shall be so served, shall be deemed good service of or be made upon such defendant or defendants upon such terms, and in such manner, and at such time as to such Courts respectively shall seem reasonable; and that thereupon it shall and may be lawful for such Courts respectively to proceed upon such service so made as aforesaid as fully and as effectually as if the same had been duly made within the jurisdictions of such Courts respectively.”

The 4 & 5 W. 4. c. 82. extends all the provisions contained in

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effectuating the service of process issuing from the Courts of Chancery and Exchequer in *England* and *Ireland* respectively; and the 4 & 5 *W. 4. c. 82.*, by which the provisions of the former act were extended, and applied to

the former act relating to suits instituted concerning lands, tenements, or hereditaments situate in *England*, or *Wales*, or in *Ireland* respectively, to "all suits instituted in the said Courts respectively concerning any charge, lien, judgment, or incumbrance thereon, or concerning any money vested in any government or other public stock, or shares in public companies or concerns, or concerning the dividends or produce thereof."

The act proceeds to extend the same provisions to "any defendant or defendants in any such suit or suits as hereinbefore mentioned, who shall appear by affidavit to be resident in any place, specifying the same, out of the United Kingdom of *Great Britain* and *Ireland*; and that it shall and may be lawful for the said Courts respectively, on motion in open Court, of any of the complainants in any such suit, founded upon an affidavit or affidavits, and such other documents as may be applicable for the purpose of ascertaining the residence of the party, and the particulars material to identify such party and his residence, and also specifying the means whereby such service may be authenticated, and especially whether there are any *British*

officers, civil or military, appointed by or serving under his Majesty, residing at or near such place, to order that service of a *subpoena* to appear and answer upon the party in the manner thereby directed, or in case where the said Courts respectively shall deem fit, upon the receiver, steward, or other person receiving or remitting the rents of the lands or premises, if any, in the suit mentioned, returnable at such time as the said Courts respectively shall direct, shall be deemed good service of such party, and afterwards, upon an affidavit of such service had, to order an appearance to be entered for such party in such manner and at such time as the said Courts respectively shall direct, and that thereupon it shall and may be lawful for such Courts respectively to proceed upon such service so made as aforesaid, as fully and effectually as if the same had been duly made within the jurisdiction of such Courts respectively."

Under the last-mentioned clause in the act, an application was made to the Vice-Chancellor by Mr. *Cooper*, in a cause of *Parker v. Lloyd*, the day after the order in *Cameron v. Cameron* had been obtained, for an order direct-

to suits respecting money vested in the public funds, shares in public companies, &c., as well as suits respecting land. The act enabled the Court to direct that service of process in any part of the United Kingdom of *Great Britain and Ireland*, upon any Defendant resident in such part of the said United Kingdom, should be deemed good service. The words, "United Kingdom of *Great Britain and Ireland*," seemed clearly to comprehend *Scotland*, and so far as the remedial object of this act was concerned, which was to prevent dishonest persons from defeating just claims upon property in this country by betaking themselves to places out of the jurisdiction, that object would be defeated, if *Scotland* were held not to be a part of *Great Britain* within the meaning of this act, and might consequently be resorted to by such persons as an asylum. In *M^r Master v. Lomax (a)*, the Vice-Chancellor granted a motion similar to that now made; but, upon a motion being afterwards made before the late Lord Chancellor, that an attachment might issue under the writ of the sheriff of *Wigtownshire*, or other proper officer in *Scotland*, against the Defendants, who were in contempt for want of an answer, Lord *Brougham* intimated that it was not the intention of

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CAMERON
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(a) p. 52. *suprà*.

directing the *British* consul at *Naples* to serve process of *subpœna* on the Defendant *Lloyd*, who was resident in that city. The Vice-Chancellor made an order that the *subpœna* should issue, but declined giving any special directions as to the person by whom, or the manner in which the *subpœna* should be served.

The second section of the last-mentioned act provides that in

cases where the defendant cannot be found, and there is just ground for believing that he secretes and withdraws himself, so as to avoid being served with the process of the Court, "it shall be lawful for the Court to order that the service of the *subpœna* to appear and answer shall be substituted in such manner as the Court shall think reasonable and direct by such order."

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of Lord *Plunkett*, under whose auspices the measure was brought into parliament, to extend its provisions to *Scotland*, and that such an extension would amount to a virtual repeal of one of the articles of the union. His Lordship did not, however, expressly refuse the motion upon those grounds; but, upon the ground that the words in the act, "if they shall so think fit," gave a discretionary power to the Court, he declined making any order.

*The LORD CHANCELLOR.**

What Lord *Plunkett* intended is, for the purpose of construing the act, immaterial, for the words of the act must speak for themselves. I am of opinion that the act extends to *Scotland*, and I so held in a late case in the Court of Exchequer, where a similar application was made.

* Lord Lyndhurst.

REPORTS

OF

CASES

ARGUED AND DETERMINED

1835.

IN THE

HIGH COURT OF CHANCERY.

CROOME v. LEDIARD.

ROLLS.
1835.
Jan. 30.

THIS cause (see p. 251. *supra*) came on for further directions upon the Master's report. The Master had found, that the Plaintiff could make a good title to the *Leigh* estate, without reference to the time at which such title could be made, the decree not having referred it to the Master to state before what time a good title could be made.

By the same instrument, the Plaintiff agreed to sell an estate to the Defendant, and the Defendant agreed to sell another estate to the Plaintiff. The Defendant, being unable to make a good title to his estate, resisted the performance of his agreement to purchase

It was insisted, on the part of the Defendant, that as the Master had not found that a good title could be made previously to the filing of the bill, the Defendant was entitled to the costs of the inquiry as to the title.

On his agreement to purchase

the Plaintiff's estate, on the ground that the agreement was intended to take effect only on the basis of a mutual exchange, and he failed in that defence.

On a reference to inquire as to the Plaintiff's title, the Master found that the Plaintiff could make a good title, but he did not find that he could make such title before the filing of the bill, the consideration of the time at which the Plaintiff's title could be made having been expressly excluded, at the hearing, from the terms of the reference: Held, that the Defendant was liable to the costs of investigating the title in the Master's office.

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CASES IN CHANCERY.

1835.

CROOME
v.
LEDIARD.

On the other side it was contended, that the Plaintiff was entitled to the costs of the inquiry, inasmuch as the Defendant had rendered the suit necessary by the nature of the resistance which he had made to the specific performance of the agreement—a resistance founded on a construction put upon the contract which the Court had declared to be erroneous, and which was wholly independent of the question of title. The costs of the inquiry as to title, therefore, without regard to the time at which a good title could be made, the consideration of time having been expressly excluded from the terms of the reference, were as much costs occasioned by the conduct of the Defendant, as any other part of the costs of the suit.

Mr. Pemberton and Mr. Wilbraham, for the Plaintiff.

Mr. Bickersteth and Mr. Whitmarsh, contrd.

*The MASTER of the ROLLS.**

The suit and the consequential inquiry were rendered necessary by the nature of the Defendant's contention as to the construction of the agreement; and as he has failed in his defence, which turned upon the construction of the agreement, and not upon a question of title, he must pay the costs of investigating the title in the Master's office. The Defendant, having by his conduct rendered the suit necessary, is liable to all the costs incident to the suit.

* *Sir C. Pepys.*

1838.



KNIGHT v. GOULD.

1835.
Dec. 12, 13, 16.

SARAH WARD, by her will duly executed and attested, after directing her debts, funeral and testamentary expenses, and also the duty on her pecuniary legacies, to be paid by "my executors hereinafter named," out of her personal estate, devised her freehold lands in the county of *Warwick* to *James Kemp*, *James Kemp* the younger, and *John Prior Ward*, "my executors hereinafter named," and their heirs, upon trust to sell the same, and stand possessed of the purchase monies upon trust, after payment of the expenses which her said trustees should incur, and also of such sums as should be reasonable for the trouble which they might experience by reason of the aforesaid trusts, and of carrying this part of her will into execution, to divide the residue of such purchase monies among certain classes of her relations therein described; and in case no such relations should be found, she directed such residue to sink into her personal estate. She then gave and bequeathed unto the aforesaid *James Kemp* the elder, *James Kemp* his son, and *John Prior Ward*, their executors, administrators, and assigns, the sum of 8000*l.*, 3 per cent. consols, part of the stock then standing in her name in the Bank of *England*, nevertheless subject to, and charged with the payment of the several life annuities thereafter particularly mentioned; and she further bequeathed unto the said *James Kemp* the elder, *James Kemp* his son, and *John Prior Ward*, the sum of 100*l.* each. She next gave the dividends of divers considerable sums of stock to certain individuals therein named respectively, with a direction that the capital should fall into and form a part of her residuary personal estate.

A bequest of residue "to my executors hereinafter named, to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble, equally between them;" followed by the appointment of three persons as executors, is a gift to those persons as a class in their official character; and, therefore, one having died in the lifetime of the testator, the whole residue vests in the two survivors.

1833.

KNIGHT

v.

GOWAN.

Her will then contained the following passage:—“I give all the rest and residue of my property not herein or hereinafter specifically bequeathed, unto my executors hereinafter named, to enable them to pay my debts, legacies, and testamentary charges, and also to recompense them for their trouble, equally between them. I do nominate, constitute and appoint my said trustees, *James Kemp*, *James Kemp* the younger, and *John Prior Ward*, to be the executors of this my will.” The testatrix proceeded to give some directions respecting her funeral; and then, without making any further bequests, concluded her will with the usual attesting clause.

James Kemp the elder, one of the three persons named as executors in the will, died in the lifetime of the testatrix; and, upon her death, the present bill was filed by persons claiming to be her next of kin, for the purpose of having their rights declared, and the usual accounts taken against her executors. The material question in the cause was, whether the share of the residue bequeathed to the executor who had died in the testatrix's lifetime vested in the two surviving executors absolutely, or whether it lapsed for the benefit of her next of kin; in other words, whether the gift of the residue was to those who should become her executors by surviving her, and assuming the office, or to the three individuals whom she had appointed to that office, taking the residue as a personal bequest.

The MASTER of the ROLLS decided that the two surviving executors took the whole; and an appeal was now brought from that decision.

The Attorney-General and Mr. Girdlestone senior, for the testatrix's next of kin, in support of the appeal, contended that the gift of 100*l.* to each of the executors was bestowed on them in virtue of their office; and that the

the residuary bequest to the executors (hereinafter named, was no more than a gift to those individuals personally, of whom that happened to be the most convenient description. The bequest was therefore to be construed according to the common rules applicable to the case of bequests to individuals; and if it were so construed, there could not be a doubt that the terms of the bequest, especially when coupled with the expression "equally between them," which followed, amounted to a gift of the residue to the three in severalty, as tenants in common.

1838.
KNIGHT
a
GOSAD.

They cited and commented upon the cases of *Bagwell v. Dry* (a); *Page v. Page* (b); *Owen v. Owen* (c) overruling the case there stated of *Hunt v. Berkeley*, in which Sir Joseph Jekyll, upon a somewhat similar bequest, had decided in favour of joint-tenancy; *Peat v. Chapman* (d); *Ackerman v. Burrows* (e) and the cases of *Mr. Pepys*, *Mr. Rolfe*, *Mr. Jacob*, and *Mr. Wood*, *contra*, submitted that the cases cited on behalf of the next of kin, were all distinguishable from the present, which must be determined solely upon the intention of the testatrix, as that was to be collected from a careful examination and comparison of all the provisions in her will. They referred to *Eyres v. Rolfe* (g); *Winn v. Francis* (h); *Roper on Legacies* (i); and also to Lord Eldon's observations in *Jackson v. Jackson* (k) with respect to the nature of the interest taken by executors.

(a) 1 P. Wms. 700.

(g) 2 Bro. C. C. 220.

(b) 2 P. Wms. 469.

(h) 2 Cpr. 190.

(c) 1 Atk. 494.

(i) Vol. ii. p. 356, 2d ed.

(d) 1 Ves. sen. 542.

(k) 9 Ves. at p. 597.

(e) 3 Ves. & B. 54.

1893:

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v.

GOULD.

Dec. 16.

The LORD CHANCELLOR.

It is not at present necessary to decide, whether these legatees take as joint-tenants, or as tenants in common. If they take as joint-tenants, it is true the question is determined in one way; the share of the predeceasing legatee would survive to his companions. But there may be a tenancy in common, and yet it will not follow that the share of the deceased is undisposed of and goes to the next of kin. Thus the bequest may be taken to be to the executors surviving and acting, but as tenants in common. And if such appears to be the right construction, the survivors take the whole; and the present question is determined as the Court below has determined it.

There is no occasion, therefore, to go further now than to examine in what character the residue is bequeathed to the executors. Is it in their individual, or in their representative character? Is it given to them as a class, or as particular persons selected for the purpose, and regarded by the testatrix, when she made her will, in their personal capacity? This is a mere question of construction upon the clause, to be determined, like every such question, by the bequest itself, and by the context, there being no rule of law which gives to any of the terms used an inflexible sense: and taking the whole matter into consideration, I cannot hesitate in coming to the conclusion, that the testatrix meant to give the residue to her executors as a class of persons, and not as individuals.

Let us then look to the intention. The testatrix gives her property to the three persons afterwards named her executors, partly as trustees, to pay debts and legacies, partly as legatees, to receive it beneficially.

By

By the same words they take in both capacities. Now it is not pretended, that the portion which they take for distribution in performance of their office, for example, to pay legacies, can suffer any abatement because of the predecease of one of their number. Why should the part they take to themselves abate any more? It is for trouble in execution of their office. What office? In performing the duty of executors. Whoever performed that duty was to have the recompense. What recompense? The residue; not their shares of it, but the residue. Equally, no doubt; that is, they who became acting executors by surviving the testatrix, were to share all the residue equally, in like manner as she had before remunerated them for their trouble in making inquiry as to her kindred.

Great reliance is placed on the words "equally between them," as giving these legatees an interest as tenants in common. But, independently of the argument already adverted to, that such may be the nature of their tenancy, and yet the surviving executors may take as a class, that appears a more natural construction which supposes the gift to be joint. The testatrix has been her own expounder; the writer is the commentator, and can best declare the meaning of the words employed in her own act. She expressly states why the gift is made of the beneficial interest; it is as a reward for performing an office. The office is joint; so, naturally, is the reward. The burthen is cast upon them jointly; it must naturally be presumed that the benefit is intended to be joint also.

That the words "equally between them" are not inflexible, and do not necessarily create a tenancy in common, is certain both on principle and authority. In

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KNIGHT

v.

GOULD.

1883:

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GOULD.

Frewen v. Relfe (a), it was said by Lord *Thurlow* that those words only create a tenancy in common with reference to the whole gift, and he added that the general intent shall sooner over-rule the word "equally," than the use of the word "equally" shall over-rule the general intent. This, too, was upon a clause considerably stronger in favour of a tenancy in common, the individual executors being named severally, which here they are not; and a similar doctrine was laid down in *Armstrong v. Eldridge*. (b)

I do not think, however, that *Frewen v. Relfe* can fairly be considered as having a more direct bearing on the present case. It is not there stated that any of the legacies had lapsed, and the suit was for the residue. And though Lord *Thurlow's* argument, which is principally addressed to the clause giving the lapsed legacies to the executors equally among them, may be said to make it probable that the residue was in part composed of lapsed legacies, still this is a matter of doubt; and I therefore prefer using the case only as I have now done. Its authority is strong as far as regards the construction put upon the gift of the lapsed legacies, and the force of words directing an equal division.

Page v. Page (c) was the case of a residue given to executors in sixths expressly. There the interest of an executor who died in the testator's lifetime was held not to survive, because each had only a sixth given him. When this decision was cited a few years afterwards to Lord *Talbot*, he approved of it, on the ground that the frame of the bequest prevented any one from taking more

(a) 2 Bro. C. C. 220.

(c) 2 P. Wms. 489.

(b) 3 Bro. C. C. 215.

more than a sixth. It is difficult to read his Lordship's observations upon the subject, without being convinced that, had the gift been to executors equally, he would have allowed the title by survivorship. For, though each taking one sixth, all take equally who do take any thing, there is this most essential difference between a gift to a class of six persons equally, and a gift to the same persons of one sixth each, that, by the former, five may take the whole among them in equal shares, literally complying with the terms of the bequest, but, by the latter, the whole cannot be divided among five or any other smaller number than six, without giving more to each than the sixth expressly allotted.

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v.
GOWAN

Owen v. Owen (a) and *Ackerman v. Burrows* (b) really prove nothing either way, for those cases establish no general rule which can govern the present case; both differing materially in the circumstances, and the latter being of a very special nature, and turning entirely on the force of a single expression. The clause now under consideration is peculiarly conceived, and the meaning given to it turns, as it ought, upon that peculiarity.

A bequest to children living at the testator's death, is, on all hands, admitted to be a bequest to the class; and it survives to those who shall answer the description by surviving the testator. Then why not also a bequest to executors? But it is said the words "hereinafter named" are added, and that those words, added to a bequest to "children," would make the description cease to be that of a class. Assuredly it would, because such words are used for the very purpose of specifying certain of the children, and therefore they must expressly exclude the supposition of a class being intended,

(a) 1 Atk. 494.

(b) 3 V. & B. 54.

1888:

Knox v

or

Gardner

tended, whereas, unless executors are named, they cannot have any existence as a class at all; and, therefore, so far from those words excluding the idea of executors as a class, they refer to the act of nomination, whereby alone that class is called into existence, so that nothing can be more fallacious than this objection. Indeed, the addition of these words of reference "hereinafter named," is mere surplusage, and can, in no way, affect the question; for, had they been left out, they must, of necessity, be understood, as no appointment having before been made, those only could be executors, and take in that capacity, who should be thereafter named.

The other objections may be easily disposed of. The gift of 100% would preclude the claims of the executors as all-beneficial interest in the residue, if there were no other bequest, and their title rested upon their representative character alone. But here the effect of that gift is destroyed by a subsequent express gift to them of the residue.

In continuation of the same argument, it is said, that the legacy having destroyed their claim as executors, they can only take the residue as legatees, and therefore cannot take it as executors. But herein is an obvious fallacy; for, though the legacy of 100% defeats their claim as executors simply, yet the residue may be given to them as executors; and, therefore, the proving that they take it as legatees, does not prove that they may not also take as executors. They are the executors made residuary legatees *quâ* executors, and a legacy destroys the claim as executors to the residue, because it shews an intention to exclude them, and give them that legacy and nothing else. But no such presumption can arise here, where the testatrix has expressly revived the

the claim of the executors, and, by express words, given the residue to them as such.

1858.]

Knight
v.
Goss.

It does not follow, from this case, that a bequest of the residue to executors equally, must, in all cases, be a gift to them in their representative capacity, and so survive to those who live to take the office. There is no necessity for going beyond the circumstances which shew that the testatrix intended them, in this case, to take as her executors. A change in these circumstances, a different expression as to the persons or as to the gift, might make it equally clear that she intended them only to take as individuals; and then the force of the word "equally" might be sufficient to let in the argument against the decree, just as the particulars of the letter, held to be a will in *Ackerman v. Burrows*, were considered to shew an intention to designate the mother and sisters individually, and not as a class.

Upon the grounds which I have explained, and taking the question as purely one of the testatrix's intention, to be gathered from the peculiar nature of the clause, and not affected by the context of the will, my own mind is free from all doubt. The decision of the Court below must, therefore, be affirmed.

1854.

1854.

April 21, 22.

A letter from *A.* to *B.*, in which *A.* engages to secure to *B.*'s family, in any way *B.* may desire by his will, a moiety of a fund, in which *A.* and *B.* are interested as joint-tenants, is a severance of the joint-tenancy.

GOULD v. KEMP.*

THE testatrix in the preceding cause died in the month of *March* 1819, two months subsequently to the death of *Kemp* the elder, the right to whose share in her residuary estate formed the subject of that suit. The two surviving executors, *Kemp* the younger, and *Ward*, proved *Mrs. Ward's* will, and took upon themselves the office of executors. Some years afterwards, but before any severance of the residuary property had been made between them, the following letter was written and delivered by *Kemp* to *Ward*, who was at the time confined to his bed by sickness:— "*Kingsland*, 30th of *April* 1822. — Dear Sir, I hereby engage, should Providence see fit that I should outlive you, to secure to your family, in any way you may desire by your will, the moiety of any stock or security now standing in the name of the late *Mrs. Sarah Ward*, and which she has bequeathed to us under her will either contingently or in reversion, namely, one moiety of the 7200*l.* 3 per cents., being the residue of 8000*l.* like annuities, after payment of the said legacy duty, and which we are entitled to in reversion, and also the contingent moiety of 4960*l.*, residue of 5600*l.* annuities, after payment of legacy duty, should we be enabled to establish our claim to that sum, or, if not, a moiety of such sum as we shall be enabled to recover; the whole, nevertheless, to be subject to such charges and expenses I may be put to in carrying the will of the late *Mrs. Ward* into execution and effect, should I be your survivor. With sincere wishes for your restoration to your family, I remain yours sincerely, *James Kemp*."

Two

* See the preceding case.

Two days after the date of this letter, Mr. *Ward* died; and pending the suit of *Knight* and *Gould*, this bill was filed by the executors of *Ward* against *Kemp*, for the purpose of establishing their right to a moiety of the interest which *Kemp* and *Ward* took, as the surviving and acting executors of Mrs. *Ward*, under the lady's will.

Part of the stock standing in the name of *Ward* and *Kemp* having been sold out by *Kemp*, subsequently to the filing of the bill, the Governor and Company of the Bank of *England* were made Defendants to the suit. *Kemp* died pending the suit, and the bill was revived against his personal representative.

The Master of the Rolls decided that the effect of the letter was to sever the joint-tenancy, and an appeal was now brought against his Honor's decision. The decree directed that the Plaintiffs should pay the costs of the Bank of *England*; and that the Defendants should pay over one half of those costs to the Plaintiffs.

The Solicitor-General (Sir C. Pepys) and Mr. *Kee*, in support of the decree.

Mr. *Knight*, Mr. *Girdlestone* jun., and Mr. *Woody* contra.

Two questions arise upon this appeal; first, whether the letter written by *Kemp*, and delivered by him to his co-executor, amounts to an agreement to sever the joint-tenancy; and, secondly, whether, supposing it to be an agreement, it is such an agreement as this Court can carry into effect. It is clear that *Kemp* could not have intended to sever the joint-tenancy; for he was wholly ignorant of the difference between a joint-tenancy and a tenancy

1884!
GOULD
v.
KNIGHT

Bill of Complaint
Filed for Record
in the Court of Chancery
at London
this 10th day of May
1884
By the Plaintiff's Counsel
Messrs. G. H. & J. W. Gould
By the Defendant's Counsel
Messrs. Knight & Co.
By the Master of the Rolls
Messrs. Knight & Co.
By the Solicitor-General
Messrs. Knight & Co.
By the Solicitor-General
Messrs. Knight & Co.

1824.

Gould

v.

Kemp.

tenancy in common. *Ward*, on the other hand, was a proctor, who well knew the effect of a severance, and who, being sensible that he was himself in a dying state, obtained from *Kemp*, by unfair suggestions and importunities, a paper by which *Kemp's* right of survivorship was intended to be defeated.

From the very terms of the agreement, it could not be an agreement to sever the joint-tenancy. For in what event was the supposed agreement to take effect? In the event of *Kemp* surviving *Ward*, and *Ward* having left a will. But at the very moment when that event happened, the right by survivorship would have accrued, and a severance of the joint-tenancy was impossible. If, therefore, it be an agreement to do any thing, it is an agreement on the part of *Kemp* to take no advantage of his right of survivorship, if it should accrue, or rather when it should accrue, for there was little doubt who would be the survivor, *Gould* being in a dying state. This would be an agreement in its nature unilateral; a bargain, on the face of it, catching and unconscientious on the part of *Gould*.

Supposing it, however, to be an agreement, the Plaintiffs must stand in the situation of a party seeking the specific performance of an agreement; and the principle upon which the Court uniformly acts is, not to give relief to such a party, unless the transaction be, on his part, perfectly fair and free from all suspicion of fraud and contrivance. This is, at any rate, an agreement, in the terms of which there is no mutuality or reciprocity; it is an agreement without any consideration moving from *Gould* to *Kemp*; and as no act was done amounting to a severance of the joint-tenancy at law, the Court could not, consistently with the principles upon which it interposes against the legal title, decree the performance

1894.

Guth
v.
Kend.

ance of such an agreement. Want of mutuality in the terms of the contract and the remedy is, of itself, a sufficient answer to a claim for the specific performance of an agreement; and it is upon this principle that an infant has been held to be incapable of sustaining a suit for specific performance: *Flight v. Bolland* (a). The Bank of England were improperly made parties to this suit. It is true that the Bank may be made parties, notwithstanding the statutes 39 & 40 G. 3. c. 56.; *Temple v. The Bank of England* (b); but wherever they are unnecessarily made parties, the Court will direct their costs to be personally paid by the Plaintiff: *Edridge v. Edridge* (c).

The Solicitor-General, in reply.

This is not a suit for a specific performance, nor does the decree treat it as such; the decree declares the severance of the joint-tenancy, the effect of which is to give one moiety of the property in question to the Plaintiff, and the other moiety to the Defendant. Any thing amounting to an agreement for a severance is sufficient to sever a joint-tenancy; and it is by no means necessary that the agreement should be in writing: *Jackson v. Jackson* (d). In *Freuen v. Kelfe* (e), Lord Thurlow says: "a note will certainly sever a joint-tenancy, because it may be severed by any contract." Here, the letter is evidence of a contract; and that contract clearly amounts to an agreement to sever the joint-tenancy. The Bank were not, in this case, irregularly made parties; for the right of making the Bank parties is not taken away by the 39 & 40 G. 3. c. 56.: *Temple v. The Bank of England* (f); and as Kemp sold out 2700*l.* of the stock

(a) 4 Russ. 298.

(d) 9 Ves. 591.

(b) 6 Ves. 769.

(e) 2 Bro. C. C. 220.

(c) 9 Mees. 500.

(f) 6 Ves. 700.

1834.

GOULD
v.
KEMP.

stock in question after the filing of the bill, it became necessary to take the most effectual means for securing the remainder of the fund.

April 22.

The LORD CHANCELLOR.

The question which arises in this case is, whether or not the joint-tenancy of *Kemp* and *Ward* was severed. There are two points made against the severance; first, that the letter written by *Kemp* two days before *Ward's* death was in ignorance of his right of survivorship as joint-tenant, and was obtained from him by the dying man's importunity, who, being a professional man, was aware of *Kemp's* rights, of which *Kemp* himself was not; and, secondly, that the letter being prospective, and only importing an agreement to sever the joint-tenancy after *Ward's* decease, when the whole estate would be in *Kemp*, this was such an agreement as this Court would not carry into effect against the legal title which accrued by the right of survivorship.

Upon the first ground it is contended, that the Court ought not to interfere; and this is treated as a suit for specific performance, in which any circumstance of unfairness on the part of the Plaintiff or those under whom he claims, or even any circumstance of hardship in the Defendant's situation will incline the Court not to interfere, but to leave the party to his legal remedy in damages.

It is needless to stop here and examine whether or not this be truly a bill for a specific performance; though I certainly have no great doubt on that part of the case. But supposing it were such a bill, there is no evidence at all of the matter suggested, except that

Mr.

Mr. *Ward* was a proctor, and died two days after the date of the letter; facts which are not denied. Nothing could be more perilous in the administration of justice, than to countenance such unsupported statements or surmises, and give weight to them in regulating the course of judicial decisions.

1834:1

Gouge

or

Kear

Is there then any thing in the second point to make the severance of the joint-tenancy questionable? That joint-tenancy is not favoured in equity is certain; and Lord *Thurlow*, in *Frewen v. Relfe* (a), has expressly said that a note will work the severance, because it may be severed by any contract; and he adds, "if the defendants said in their answer that they agreed to do so, I should construe them to have done an act sufficient to sever." This shews that the bare agreement has the force of actual severance, and that the severance is held to be executed, though there exists only an agreement which is as yet unperformed; and it will presently be seen that the same doctrine is generally recognised.

It was contended, however, that this agreement was only to take effect in the event of *Kemp* surviving *Ward*; that his survivorship, at the instant of *Ward's* decease, vested the whole estate in possession in him, as having survived his companion; and that, consequently, the agreement or letter fails to affect the estate.

It is certainly undoubted law that a joint-tenant cannot devise even his own share; for as the will cannot take effect until his decease, and at that instant the share vests in his companion, so were he even to devise to his companion, he would take, not by force of the devise

(a) 2 Bro. C. C. 220.

1834.

GOULD
v.
KEMP.

devise, but by the survivorship, and would be in of the original estate. This is quite clear, and so it is laid down by *Littleton* (a) and Lord *Coke* (b), as well as in a case of *Swift v. Roberts* (c), where the bearings of the subject were well considered in two full arguments. But it is equally clear that a joint-tenancy may be severed prospectively by one of two joint-tenants, although he cannot do so by a gift to take effect upon his own decease, when that event has given the other the whole by survivorship. The *dictum* of Lord *Thurlow* in *Frewen v. Relfe* (d) goes fully to this length, and it accords with Lord *Hardwicke's* doctrine in *Partridge v. Powlett* (e), where, though he laid it down that a declaration that the joint-tenancy should be severed was not enough to work the severance, he nevertheless held that an agreement to that effect worked a severance. Now agreement always means something *in futuro*, and nothing is done till the thing be executed; yet the bare agreement, while the matter rests *in fieri*, works a severance. So a lease by one joint-tenant, to commence at his death and living his companion, works a severance of the joint-tenancy, *Com. Dig. Estate* (R. 5.); and so it was ruled in *Clark v. Clark* (g), where one of two joint-tenants made a lease for eighty years, if her companion should so long live, to commence at her decease, and it was held that the joint-tenancy was severed; and the same doctrine is recognised in *Co. Litt.* 186. b.

Indeed, the argument on which this doubt is raised has no solid foundation. The joint-tenant, who is doing the act of severance, does nothing which is to commence
at

(a) *Litt.* 287.(b) *Co. Litt.* 185. b.(c) 3 *Burr.* 1498.(d) 2 *Bro. C. C.* 220.(e) 2 *Atk.* 154.(g) 2 *Vern.* 293.

at his own decease, when his power over his moiety of the *corpus* is gone by the right of his surviving companion to the whole vesting in possession. He only does something which is to take effect at his companion's decease, and when his own power over his undivided moiety endures as fully as ever.

1834.
GOULD
v.
KEMP.

I am clearly of opinion, therefore, in this case, that the joint-tenancy was severed; and the decree of the Master of the Rolls must be affirmed. I have some doubt whether the Bank were properly made parties, and I think therefore that no part of the costs of the Bank ought to be paid by the Defendants.

1835.

ROLLS.
1835.
Jan. 30.

BICK v. MOTLY.

Where the Master by his report finds a fact involving, according to the practice of the Court, a particular consequence, the Court will act upon the fact so found, and it is not a ground of exception, that such consequence is not stated in the report.

The Master found that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate; and that the sums so received by them were debts proveable under their respective commissions, both executors having become bankrupt:

Held, that in-

terest at 5 per cent., as the consequence of the *devastavit*, was to be added to the principal sums found to be proveable against the bankrupt estates of the executors.

BY an order made in this cause, the Master was directed to take the usual accounts of the personal estate of the testatrix in the cause; and, amongst other things, to ascertain and state the amount of the debts due to the estate of the testatrix from the Defendants *James Motly* and *John Togwell*, executors of the testatrix, who had both become bankrupts; and to state what sums ought to be proved under their respective commissions. And the Master was to be at liberty to state any special circumstances relative to the outstanding personal estate of the testatrix, and to the debts or debt due from the Defendants *James Motly* and *John Togwell*, and which ought to be proved under the said commissions respectively, as he might think proper.

The Master found that, upon the receipts and payments of *James Motly* as executor, there was a balance of 74*l.* 7*s.* 1*d.*, which was due from him to the estate of the testatrix, and ought to be proved under his commission; and that upon the receipts and payments of *John Togwell* as executor, there was due to the estate of the testatrix a balance of 665*l.* 2*s.* 5*d.*, which ought in like manner to be proved under his commission. And he found that, after the death of the testatrix, the Defendants *James Motly* and *John Togwell*, as executors of the said testatrix, or one of them, with the knowledge, consent, and approbation of the other of them, placed or caused to be placed to the joint account of the executors,

cutors, in the banking-house of Messrs. *Pitt and Co.*, bankers, *Cheltenham*, divers sums of money, being part of the personal estate of the testatrix. And he found that on the 20th day of *October* 1824 *John Togwell*, as one of such executors, received from the said bank the sum of 100*l.* under the joint cheque of himself and *James Motly*, the said *John Togwell* being at that time largely indebted to the testatrix's estate. And he found that *James Motly* thereby became liable for such sum of 100*l.*, and that the same ought to be proved under the commission of bankrupt against *James Motly*, in addition to the aforesaid balance of 741*l.* 7*s.* 1*d.* And he further found that *James Motly*, as one of such executors, received from the said bank, under the joint cheque of himself and *John Togwell*, several sums of money, from *September* 1824, to *January* 1828, making together the sum of 600*l.* And he found, that at the times the said several sums of money were paid to *James Motly*, the said *James Motly* was largely indebted to the testatrix's estate; and that *John Togwell* thereby became liable for such several sums, amounting together to the sum of 600*l.*; and that the same ought to be proved under the commission against *John Togwell*, in addition to the aforesaid balance of 665*l.* 2*s.* 5*d.*

1835.

BICK
v.
MOTLY.

On the cause coming on for further directions, Mr. *C. Romilly*, for the Plaintiffs, submitted, that as the Master had found that *Motly* and *Togwell* had respectively committed a *devastavit* upon the testatrix's estate, *Motly* by enabling *Togwell* to get into his possession the sum of 100*l.*, and *Togwell* by enabling *Motly* to possess himself of 600*l.*, the Defendants' estates ought respectively to be charged with interest at 5 per cent., upon the sums so permitted to be improperly drawn out; and he cited *Tebbs v. Carpenter* (a), and *Underwood v. Stevens*. (b) In this

(a) 1 *Mad.* 290.

(b) 1 *Mer.* 712.

1835.

Bick

v.

MOTLY.

this case the finding of the Master charged each executor with a *devastavit*, and their respective estates were consequently liable, according to the practice of the Court, to pay interest at 5 per cent. The Plaintiffs were, therefore, entitled to a reference back to the Master to calculate interest at 5 per cent. on the sums found to have been improperly drawn out.

Mr. *Pemberton* and Mr. *Sharpe*, *contra*, contended that, as the Master had expressly found that the principal sums drawn out ought to be proved against the estates of the bankrupts in addition to the balances before found to be due, and as no exception had been taken to the Master's report, the Plaintiffs were not now entitled to claim any interest, still less interest at 5 per cent., by way of penalty for an act not amounting, for anything that appeared upon the report, to more than an act of negligence. As far as the sum of 100*l.* was concerned, the expense of the reference back to the Master to calculate the interest would exceed tenfold the amount of interest when calculated. There was no precedent for an executor being charged with interest at 5 per cent. for having permitted his co-executor to receive money; more especially where the estate of the executor, against which the interest was to be charged, was a bankrupt estate.

*The MASTER of the ROLLS.**

The Master by his report, after stating the balances due from the estate of each executor upon his receipts and payments, as executor, finds specially that *Motly* enabled his co-executor *Togwell* to receive from a particular banking-house, under the joint cheque of *Motly* and *Togwell*, the sum of 100*l.* belonging to the estate of the

* Sir C. Pepys.

the testatrix, at a time when *Togwell* was largely indebted to that estate; and that *Togwell* enabled *Motly* to receive, under like joint cheques, several sums of money belonging to the estate of the testatrix, amounting in the whole to 600*l.*, when *Motly* was largely indebted to that estate; and he finds that those sums of 100*l.* and 600*l.* ought to be proved against the bankrupts' estates respectively, in addition to the balances before found due upon their receipts and payments. Where the facts are so clearly stated in a report, as necessarily to involve a particular consequence, it is for the Court to act upon the facts so reported, and it would not be a proper ground of exception that the Master had omitted to point out the consequence. Here the Master has found that in respect of the sums of 100*l.* and 600*l.*, the executors have, each of them, committed a *devastavit*; and, according to the uniform practice of the Court, each of the executors is chargeable with interest at 5 per cent. upon the sums which he enabled his co-executor to receive.

1835.

BICK
v.
MOTLY.

An order was made, that interest at 5 per cent. should be added to the principal sums of 100*l.* and 600*l.*, to be proved against the bankrupts' estates respectively; and that, in case the parties should differ as to the amount of the interest, it should be referred back to the Master to calculate the same.

1835.

ROLLS.
Jan. 31.

BAYLIS v. GROUT.

The Court will not interfere in questions arising upon the practice of retainer.

A motion for an injunction to restrain a particular counsel, who had acted for the Defendants, from acting, at a subsequent stage of the proceedings, on behalf of the Plaintiffs from whom he had received a retainer, was refused.

THIS was a motion on the part of the Defendants in the cause, one of the objects of which was to obtain an injunction to restrain Mr. *Kindersley* from acting as counsel for the Plaintiffs, from whom he had received a retainer since his promotion to the rank of King's counsel, on the ground that Mr. *Kindersley* had drawn the answer to the bill, and had otherwise acted in the progress of the suit on behalf of the Defendants.

Mr. *Bickersteth*, with reference to this part of the motion, said that, although the law or practice of retainer was a subject not altogether free from obscurity, and there was some doubt as to the jurisdiction of the Court to interfere with matters relating to the retaining of particular counsel, yet, if any rule upon this subject could be held to be clear and reasonable, it was that where a counsel had, by reason of the part he had taken in a particular suit, possessed himself of a knowledge of the case of the party for whom he acted, he ought not to receive a retainer from, or afford his assistance to the opposite side, without giving notice to the party for whom he had previously acted. In *Cholmondeley v. Clinton* (a), it was said by Sir *Samuel Romilly*, in the argument, that great laxity prevailed at the bar as to retainers, and that a difficulty, when it occurred, was usually referred to some other counsel; and Lord *Eldon*, in his judgment, made the following observations: — "The practice of the bar in

(a) 19 Ves. 261. and Coop. 80.; and *Ex parte Lloyd*, in the note and see *Ex parte Elsee, Montagu's Ca. in Bankruptcy*, 69., to that case.

in my time was this ; if a retainer was sent by a party against whom the counsel had been employed, the retainer being in a cause between the same parties, the counsel, before accepting it, sent to his former client stating the circumstance, and giving him the option. That has, I believe, been relaxed ; and the course is as it has been represented at the bar. I do not admit that he is bound to accept the new brief. My opinion is, that he ought not, if he knows any thing that may be prejudicial to his former client, to accept the new brief, though that client refused to retain him." In the present case, the Defendants insisted that a particular counsel, who had acted on their behalf in the previous proceedings, had obtained such a knowledge of their case as could not but be prejudicial to them, if he gave his professional assistance to the other side ; and, in that state of circumstances, Lord *Eldon's* opinion went, undoubtedly, to a distinct recognition of the propriety and reasonableness of the present application.

1835.
BAYLIS
v.
GRANT.

*The MASTER of the ROLLS**, without calling upon the other side to argue this part of the motion, said that, as the Defendants had not taken the usual means of securing the professional assistance of Mr. *Kindersley*, the Court could not interfere. The case cited went itself to show Lord *Eldon's* opinion, that the Court had no jurisdiction to interfere in questions arising upon the practice of retainer.

* Sir C. Pepys.

1835.

ROLLS.
Feb. 3.

In the Matter of EVANS.

An estate, of which *A.* died seised in fee, descended upon *A.*'s five infant sisters. The father and mother of the infants being both living, and the estate of the sisters being consequently liable to be devested by the birth of a nearer heir of *A.*, it was held, that the infants were not seised of or entitled to land in fee, within the meaning of the 1 *W.* 4. c. 65. s. 17.

THE petitioners were five infant sisters, upon whom certain estates, of which their brother *William Harris Evans*, an infant of the age of seven years, died seised in fee, had descended. *William Harris Evans* died on the 14th of *June* 1833; and *Thomas Evans*, and *Margaret* his wife, the father and mother of the infants, were both living.

By an order made on a petition presented on behalf of the infants for the purpose of enabling them to make a lease of the descended estates, under the 1 *W.* 4. c. 65., intituled, "An Act for consolidating and amending the Law relating to property belonging to Infants," &c., it was referred to the Master to inquire whether they were entitled to the premises for an estate in fee within the meaning of that act.

The seventeenth section of the 1 *W.* 4. c. 65. enacts, — "That where any person, being an infant under the age of twenty-one years, is or shall be seised or possessed of or entitled to any land in fee, or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person that a lease or under-lease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant or his guardian in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made

made in a summary way upon the petition of such infant or his guardian, to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants as the said Court of Chancery shall direct." It was objected before the Master that, as the infant sisters were not * absolutely heirs, their estate being liable to be defeated by the birth of a son, or affected by the birth of a daughter or daughters of the father and mother, they were not seised of or entitled to land in fee within the meaning of this section; and the Master found, that they were not so seised or entitled.

1835.
In the Matter
of EVANS.

The present petition was presented for the purpose of having it referred back to the Master to review his report; or to settle a lease, if the Court should be of opinion that the Master's report was erroneous.

Mr. *Rogers*, in support of the petition.

The MASTER of the ROLLS† said, that as the infant petitioners had not, at present, an indefeasible estate of inheritance, though they might acquire such estate, he was of opinion that the Master was right in finding that they were not seised of or entitled to land in fee within the meaning of the act.

* See *Co. Litt.* s. 3. 11. b. *Shelley's* case, 1 Co. 95. b., and *Kirton's* case, *Cro. Car.* 87. But now by the 3 & 4 W. 4. c. 106. s. 6. every lineal ancestor is rendered capable of being heir to any of his issue, in preference to collateral persons claiming

through him; and the land would, in the case reported, ascend to the father. The eleventh section of that act provides, that it shall not extend to any descent taking place on the death of any person before the 1st of *January* 1834.

† Sir *C. Pepys*.

1835.

ROLLS.
Feb. 3.

LARKINS v. PAXTON.

A simple-con-
tract creditor,
who files a
bill for the
administration
of a testator's
assets, is en-
titled to have
his costs out
of the estate,
though the
assets prove
insufficient for
the payment
of the specialty
creditors.

THIS was a suit instituted by simple-contract creditors; and the assets having proved insufficient to pay the specialty creditors, a question was made, whether the Plaintiffs were entitled to their costs.

Mr. *Tinney*, on the part of the specialty creditors, relied upon *Young v. Everest* (a), as an authority to shew that where a simple-contract creditor filed a bill, and it turned out, upon the Master's report, that the assets were not sufficient to pay the specialty creditors, the fund was not to be further diminished by the payment of the Plaintiff's costs.

Mr. *Pemberton*, for the Plaintiffs, submitted that the decision in *Young v. Everest*, if it was to be regarded as an express decision, was against principle, and contrary to the course which had been uniformly followed by the Court.

The MASTER of the ROLLS* said, that in *Young v. Everest* it was referred back to the Master to continue the accounts; and what was there said by the late Master of the Rolls could scarcely be considered as an express decision that a simple-contract creditor, who filed a bill, and failed himself to derive any benefit from the suit, was to be deprived of his costs. It was contrary to reason, and to the uniform practice of the Court,

* Sir C. Pepys.

(a) 1 *Russ. & Mylne*, 426.

Court, that specialty creditors, who came in to take the benefit of a suit instituted by a simple-contract creditor, should throw the burthen of the costs of the suit upon the simple-contract creditor, where the assets proved insufficient for the full satisfaction of their claims. The Plaintiffs were, therefore, entitled to their costs out of the fund.

1835.
LARKINS
v.
PAXTON.

BLACKWELL v. TATLOW.

1833.
Nov. 15. 25.

ON the hearing of this cause in *January* 1831, the bill was dismissed with costs. The costs of the Defendants *George Wilson* and *William Wilson* having been taxed at 133*l.* 14*s.* 11*d.*, a writ of attachment directed to the sheriff of *Derbyshire* was afterwards issued against *William Burnham Blackwell* the elder, who was one of the Plaintiffs, for non-payment of that sum. To this writ a special return was made by the sheriff, beginning in these terms:—"By virtue of the annexed writ, to me directed and delivered, I have made my mandate to the bailiff of the liberty of the hundred of *Scarsdale* in my county, to attach *William Burnham Blackwell* in the said writ named, which said bailiff hath the full return of all writs and process, and the execution of the same within the liberty aforesaid, so that no execution of the same can be made by me within the said liberty, which said bailiff hath returned to me as follows:—viz. By virtue of the annexed mandate to me directed, I, *William Nicholson*, the bailiff of the hundred of *Scarsdale*, in which hundred the

The sheriff's return of a caption and rescue is a sufficient ground, without affidavit, for an absolute order of commitment for contempt.

Where a party previously in contempt for disobeying an order, is taken into custody and committed to the Fleet for a contempt in effecting a rescue, the custody shall be held to apply to both the contempts, and both must be cleared before the party can be discharged; and subsequent orders up to a sequestration, proceeding upon such commitment, are not vitiated because they refer to the original contempt only.

Defendant

quent orders up to a sequestration, proceeding upon such commitment, are not vitiated because they refer to the original contempt only.

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 BLACKWELL
 v.
 TATLOW.

Defendant (*a*) resides, together with two assistants, went to the house of *William Burnham Blackwell* the elder, the Defendant in the said mandate named, on *Saturday* evening the 28th day of *January* last, there being not the slightest probability of succeeding in any endeavour to attach the said Defendant in the daytime or otherwise than by taking him by surprise." The bailiff's return went on to state in detail the circumstances under which, at a late hour of the night, and after a violent scuffle, the capture of the Plaintiff in his dwelling-house was made by the bailiff and two assistants, and the mode in which, in consequence of the force and violence of the Plaintiff himself, and the different members of his family, several of whom assaulted the officers, and wounded one of them severely with a knife, a rescue was effected, and the Plaintiff eventually made his escape. The return proceeded as follows:—"and I have not since been able to find the said Defendant so as to attach him as by the said mandate I am commanded. The answer of *William Nicholson*, bailiff. The answer of *Sir Charles Henry Colville*, Knight, Sheriff."

On the motion of *Sir E. Sugden*, who produced and read the sheriff's return in court, and cited the following cases in support of his application, *Frederick v. David* (*b*); *Sambroke v. Ekins* (*c*); *Van v. Price* (*d*); *Elliot v. Halmarack* (*e*); the Lord Chancellor granted an *ex parte* order for a serjeant at arms against *William Burnham Blackwell* the elder. The order bore date the 8th of *May* 1832, and was in these terms: "Upon opening of the matter, &c. it was alleged, that an attachment having issued against the Plaintiff *William Burnham Blackwell*,

(*a*) This was an inaccuracy in the return, *W. B. Blackwell* having been a plaintiff and not a defendant in the suit.

(*b*) 1 *Vern.* 344.

(*c*) 1 *Dick.* 68.

(*d*) 1 *Dick.* 91.

(*e*) 1 *Mer.* 302.

Blackwell, directed to the sheriff of *Derbyshire* for not paying the sum of 193*l.* 14*s.* 11*d.* for costs, pursuant to an order dated the 28th day of *January* 1831, and the report of Mr. *Cross* one of the Masters of this court, dated the 4th day of *July* 1831, the said sheriff made the following return to the said attachment." The order then stated the return *verbatim* as above set forth, and proceeded: "It was therefore prayed that the serjeant at arms attending this court may take the said Plaintiff, *William Burnham Blackwell* the elder, into his custody, and bring him to the bar of this court to answer his said contempt, which, upon hearing the said return read, is ordered accordingly, and thereupon such further order shall be made as shall be just."

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TATLOW.

In pursuance of this order, the Plaintiff was brought to the bar of the court, and the following order, dated the 26th day of *May* 1832, was thereupon made by the Vice-Chancellor: — "The Plaintiff, *William Burnham Blackwell* the elder, having this day been brought up to the bar of this court by the serjeant at arms attending this court, for not paying the sum of 193*l.* 14*s.* 11*d.* for costs, pursuant to an order, &c., and still persisting therein: It is ordered, that the said Plaintiff, *William Burnham Blackwell* the elder, be turned over to the prison of the Fleet, and do remain therein until he shall pay the said sum of 193*l.* 14*s.* 11*d.*, pursuant to the said order and report, clear his contempt, and this Court make other order to the contrary."

On the 5th of *July*, 1832, a further order was made, which after reciting the several previous orders, proceeded as follows:—"That it appears by the certificate of the warden of His Majesty's prison of the Fleet, that the said *William Burnham Blackwell* the elder is a prisoner in the said prison for his said contempt. It is there-

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 TATLOW.

thereupon ordered that a commission of sequestration do issue, directed to certain commissioners to be therein named, to sequester the said Plaintiff's personal estate, and the rents, issues, and profits of his real estates, until he shall pay the sum of 133*l.* 14*s.* 11*d.* to the said Defendants, *William Wilson* and *George Wilson*, clear his contempt, and this Court make other order to the contrary."

On the 19th of *July* following, a writ of sequestration issued accordingly, directed to certain commissioners therein named.

Mr. Pepys and *Mr. J. Russell* now moved on behalf of *William Burnham Blackwell* the elder, that the three several orders of the 8th day of *May*, 1832, the 26th day of *May*, 1832, and the 5th day of *July*, 1832 respectively, and also the sequestration issued by virtue of the last-mentioned order, might be discharged for irregularity, with costs.

The various grounds on which the application was supported are stated and discussed in the judgment.

Sir E. Sugden opposed the motion.

Nov. 23.

The LORD CHANCELLOR.

Although in this case much attention was given to the form of the proceeding when the order was made, in *May* 1832, for the serjeant at arms, yet the great importance of all questions affecting the liberty of the subject, has called for a full reconsideration of the matter upon the motion for discharging that order and the two subsequent orders of the Vice-Chancellor, supported as that motion was with great learning and ability.

The

The order for the serjeant begins with stating the issuing of an attachment for not paying the sum of 139*l.* and a fraction, pursuant to the order of the Court and report of the Master: it then sets forth the sheriff of *Derbyshire's* return, which consists in a *mandavi ballivo* and the bailiff's return, the sheriff stating that the bailiff has the exclusive return of writs within the liberty of *Scarsdale*, in his bailiwick. The bailiff's return is, that he made a caption of the Plaintiff within the franchise, and on a day and at an hour stated; but that he was rescued by force, accompanied with much indecent violence, and in circumstances amounting to a high and even aggravated contempt of the process of the Court and its officers. It adds, that the party so rescued made his escape, and that the bailiff could not find him so as to execute the attachment. "Upon hearing the said return read," the order is made, commanding the serjeant at arms to take the party into custody, and bring him to the bar "to answer his said contempt."

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v.
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The first question that arises is, what shall be intended by "his said contempt;" and although the first contempt in not paying is certainly recited in the outset of the order, yet I incline to think that the other, or incidental contempt of the rescue, must be understood as meant. It is the last antecedent; it is very minutely described; and, moreover, if the warrant were not issued for that, a flagrant insult would be offered to the process of the Court, without any means of vindicating it unless by a new caption. For, suppose the party only taken upon the original contempt, and in custody for no other offence, he might clear that by payment of the money, and must then be discharged, in order to be taken again by a new warrant; whereas, if he is taken for the second contempt, the rescue, there being a

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process out for the first contempt, he may be visited for both the one and the other on the same custody.

It may be observed, that there is no contempt stated in terms, in reciting either the attachment or the rescue; so that it is only by the legal effect of the matters stated in both that the antecedent referred to is obtained. But that is quite sufficient; and I only mention the mode of recital to shew that it is common to both.

As for the return being in substance a *non est inventus*, I place the less reliance upon that, because, although there are precedents for the serjeant going upon such a return, and I have been furnished with one in a case of *The Royal Exchange Assurance Company v. Hill* (a), yet that is not the common practice; and, accordingly, the plaintiff relies on this circumstance as aiding the construction which he puts on the order, and to which I incline, that it was grounded upon the rescue.

I wish, therefore, to consider the regularity of the process on the Plaintiff's assumption, and to meet and dispose of the question he has raised; whether or not such process is well issued upon a return, strictly regular in all respects, of a caption and a rescue, but without any affidavit of those facts. My clear opinion is, that the process was well issued upon the return; and that this conclusion, while it is supported by principle and by analogy, is inconsistent with no authority, violates no rule of the Court, and obviates consequences highly inconvenient, and even dangerous to the practice of the Court, without occasioning any mischief whatever to any party.

As a general principle, there can be no doubt that for contempts of this nature, consisting in violence to-

wards

(a) *Hilary* term 1761. Reg. Lib. B. fol. 99.

wards the officer or insults towards the process of the Court, persons can only be arrested and brought before it upon affidavit of the fact charged.

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By Lord *Bacon's* 77th order, contempts of such kind — there described as “contempts of force or ill-words upon serving of process” — are to be dealt with summarily, as to commitment; but it is expressly assumed that they must be proved by affidavit: and in Lord *Clarendon's* orders upon commitment (copied from those made a few years before, during the Commonwealth) the oath of one or more persons, it is taken for granted, is necessary as the foundation of the process, and in such a manner as to have raised a doubt whether, in all cases of commitment on motion for contempt, two witnesses be not necessary; a doubt which is supported by a case in *Atkyns* (a), where the Registrar stated that for words contemptuous of the process, two witnesses were required, though for a battery, one might suffice; but Lord *Hardwicke* doubted the distinction. I take leave to think that this cannot now be considered as law, and that the oath of a single witness is sufficient here, as in every other case. But those orders, and the language in that and the other cases, such as *Ex parte Clarke* (b), plainly shew, that commitments without any oath never were contemplated.

The general rule, therefore, is unquestionable, that there must be an oath to verify the facts before the commitment can take place. But to this there is one well-known exception, where there is evidence higher than any testimony, the contempt being committed in the face of the Court (c); there it would be absurd to require any affidavit. So a magistrate may commit for a breach

(a) *Anon.* 3 *Atk.* 219.

(c) *Mr. Wellesley's case.*

(b) 1 *Run. & Mylne*, 563.

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 v.
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a breach of the peace occurring in his presence, but if the breach be the subject of complaint, he must proceed upon oath.

I think that the present case affords another exception, both upon principle and upon the practice of the courts of law; although the question has never been the subject of judicial decision in this place. There is here a return by the sheriff, the subordinate return from the bailiff of the liberty within his bailiwick being incorporated by him in his return, and being indeed itself the return of an officer who is *quasi* sheriff of the liberty. That return is of a caption being made in the regular execution of the process of the Court. The return is regular in every respect; it sets forth the fact of the bailiff having the return of the writs within the liberty exclusively; it states the caption, and it states the rescue in terms, adding many circumstances of great aggravation. It is necessary to give credit to such return if formally and solemnly made; otherwise the issuing of one process would only be the prelude to issuing another, grounded upon the same kind of evidence. The Court does not, indeed, proceed without ground; it does not attach upon a statement or a suggestion that its process has been contemned and its officer obstructed, any more than it attaches upon a suggestion, that there has been a default in obeying any of its orders. It is agreed that there must be something to shew that the contempt has been committed; the only question is, whether an affidavit is necessary, and whether the return is not sufficient; and I think it would be of dangerous consequence to the process of the Court if the return were held insufficient. As for the risk or inconvenience to the party, it is now admitted that the proceeding is *ex parte*, and that though an affidavit were required, he could have no notice nor any opportunity of answering it. His security, therefore,

fore, cannot be said to be materially lessened by substituting in this *ex parte* proceeding the return of the sheriff for the affidavit of the officer or other person to the facts returned.

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&
TATLOW.

The courts of common law have always treated a return of a rescue as equivalent to a conviction. It was so considered in *Rex v. Pember* (a), after an inquiry as to the practice of the Crown Office, the result of which was, that process issues from that office immediately upon the return, as upon a conviction. It was so considered in *Rex v. Elkins* (b), where the only doubt expressed was upon the old practice, cited from a case in *Salkeld*, of fining all persons returned as rescuing in the same sum in all cases. That case, and another in *Strange* (c), as well as the whole head of *Rescous* (d) in *Comyn's Digest*, clearly shew that such returns are conclusive, and cannot be traversed; *the Lady Russell and Wood's Case*. (e) From the case in *Salkeld* it appears, that affidavit of rescue, in the Common Pleas at least, is held of no avail; there must be a return.

It would be a singular anomaly if that return, which is of such high avail on one side of the hall, as to have the full force of a record of conviction, and lead to instant execution, were here to have no weight at all. But I am not called upon to say whether or not the return made is traversable; it is used only as the ground for attaching the party and bringing him before the Court to answer the charge; it is not treated as a final adjudication, but in every respect as *mesne process*. He is brought before the Court accordingly, and he has then an opportunity of answering, and of defending himself.

Nor

- (a) *Hardwicke's K. B. Ca.* 112. (d) *D.* 4, 5, and 6.
(b) 4 *Burr.* 2129. (e) *Cro. Eliz.* 780.
(c) *Sheather v. Holt*, 1 *Str.* 531.

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Nor do I say, that he may not, even after he has been turned over, be aided or released upon application to the Court. At law the punishment is at once ordered, and, it may be, a fine imposed, which is conclusive, and the only remedy of the party is by action for a false return. Here, in one sense, the proceeding may be termed remediless, inasmuch as the arrest is irrevocable. But the party has the same right to apply for his discharge, and to shew that he was not guilty of the contempt, as he would have if committed upon affidavit; moreover, he has the same kind of redress against those, through whose misrepresentation he has been committed, for the Court will, on cause shewn, refer it to the Master to inquire how far he has been injured.

It is not, therefore, contended, that the return is binding upon the Court as at law, and that it amounts to a judgment, upon which execution must instantly follow; but only that it entitles the Court to bring the party before it, and put him upon his defence. Instead of giving the return the greatest force known in the law, that of the record of a final judgment, I only give it the least force, that of the foundation of mesne process.

Neither do I say, that any return of a contempt not amounting to a rescue would have even this force. Unless a caption and rescue were actually returned, the case would not be brought within the authorities at law; and a return of such a contempt as rendered it impossible to execute the process may come within the same principle. Whether or not that would be sufficient without affidavit, I am not called upon in this case to decide. Upon principle I can see no difference; but there is no authority to warrant me in so extending the rule. All other contempts of the process of the Court, however gross, must, upon the authority of the rules and of the cases

cases in this Court, be dealt with by evidence upon oath; that is, by affidavit.

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A little consideration will at once shew that there is nothing in the judgment I am now giving inconsistent with the authorities to which I referred in the outset, whether of the orders or of the decisions. None of these contemplate the case of a rescue returned by the sheriff, or indeed of any contempt returned at all. Lord Bacon's seventy-seventh order plainly supposes the only evidence before the Court to be an affidavit of a contempt towards the process of the Court, and it makes no provision for the case of that contempt appearing on the face of the return. Moreover, it makes the commitment proceed "forthwith," upon such affidavit, whereas in other contempts, as disobedience of decrees, &c. the affidavit only entitles the Court to attach, for the purpose of examining the party touching his offence. The force which I am now attributing to a return of the former and worse sort of contempt, is no greater than the order gives to an affidavit in the latter and lighter kind; and much less than the order gives to an affidavit in the worse kind.

The like observation is applicable to Lord Clarendon's orders touching commitment.

In the anonymous case in *Atkyns* (a), and in *Ex parte Clarke* (b), there was no return at all; and nothing was there said as to the effect of a return. Nor must it be forgotten, that in the latter case the order for commitment is made upon affidavit, and absolute in the first instance, without hearing the party. Surely then it is not at all inconsistent with this to hold that a regular return

(a) 5 *Atk.* 219.

(b) 1 *Russ. & Mylne*, 565.

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return of a contempt justifies the Court, not in committing absolutely without hearing, but in bringing the party before it to answer the allegation.

If, therefore, the warrant was well issued to the serjeant, and the Plaintiff was in lawful custody when brought up to answer his contempt, there is no dispute of the legality of his commitment for that contempt. He was then by an order of the Vice-Chancellor turned over to the Warden of the Fleet, and thereupon, by another order of his Honor, sequestration was awarded. Both of those orders, it is said, purport to proceed upon his being in custody for the original contempt in not paying money pursuant to the order and report; whereas he was in custody for the incidental contempt which followed, namely, the rescue. Now, it is by no means correct to say, that he was not in custody for the original contempt also. Assuming the warrant to have been issued for the rescue, still when he thereby came into the lawful custody of the Court, it is certain that he could not be discharged without clearing his original contempt. He was, strictly speaking, in custody for both; because I hold it to be undeniable, that the original contempt continuing uncleared, and that the execution of the warrant to take him for that contempt having been obstructed by him, the caption made on the second warrant shall enure to detain him for the contempt on which the first issued; and the custody for the second offence shall extend to the first.

But it is not stated in either of the Vice-Chancellor's orders, that the Plaintiff was in custody for his original contempt of not paying the money. The order for turning him over to the Fleet, merely recites that he is brought up to the bar of the Court by the serjeant for not paying the money, which is perfectly correct

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correct; for whatever was the ground of the caption, he might be brought to the bar for not paying the money. Suppose he had suffered imprisonment for a certain time in respect of the rescue; before being discharged he would be obliged to clear his original contempt, and upon an order being made to discharge him for the rescue, as having been sufficiently punished for that offence, he would, as of course, be liable to be brought up for the other contempt, and must clear it before obtaining his liberation. Again, the order of sequestration states, that the serjeant had been commanded to take him, and to bring him to answer his contempt in not paying the money, but it adds, that by another order he was turned over to the Fleet till he should clear the original contempt; and this is quite sufficient ground for the sequestration, whatever may have been the warrant upon which he came into the custody of the Court. Neither of these orders of the Vice-Chancellor, therefore, proceeds upon the ground that he was in custody for the original contempt, although, if they had, it by no means appears incorrect to say that, being taken for the second contempt, he was in custody for both.

In any view, therefore, which can be taken of these orders, and of the whole case, I am clearly of opinion that the process is unimpeachable. The order under which the serjeant made the caption is in all respects strictly correct; and that by which the party was turned over to the Fleet, and then sequestrated, is not vitiated by the reference made in his Honor's orders to the original contempt. It is needless to add that, unless the construction set up by the plaintiff is put upon the warrant to the serjeant, namely, that by "said contempt," is to be intended the rescue, no question whatever can be raised upon the strict correctness of these orders of the

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Vice-Chancellor. The regularity of the orders has been throughout considered upon the assumption, to which I incline, that such is the true construction of the warrant.

The motion must be refused with costs.

Dec. 19. 30.

PELL v. STEPHENS.

A., as assignee of *B.*, a bankrupt, gave an undertaking to *C.*, who was the mortgagee of one farm, and was under a contract to purchase another farm, both the property of the bankrupt, and who had a distress upon the mortgaged premises, that if the distress were withdrawn he would pay to *C.* the arrears then due in respect of the mortgage, out of the effects on the premises. *C.* withdrew the distress accordingly, and afterwards the

bankruptcy was annulled before *A.* had obtained possession of any part of the bankrupt's effects; whereupon *C.* brought an action on the undertaking, and recovered judgment against *A.* personally: Held, on a bill filed by *A.* against *C.*, to which *B.* was no party, that *A.* could have no relief in equity against the judgment at law; and that he was not entitled, as against *C.*, to claim repayment of the sum thereby recovered out of the price which *C.* had contracted to pay for the other farm.

THIS was a motion on behalf of the Plaintiff, that the Defendant might be restrained from proceeding upon a judgment which he had recovered in an action in the Court of Exchequer, and from commencing any other action at law touching the matters stated in the bill. The case appeared, from the statements in the bill and answer, to be as follows:—

The defendant *Stephens* was mortgagee of a farm at *Barby*, which belonged to a person of the name of *Lord*. On the 3d of September 1832, a fiat in bankruptcy issued against *Lord*, under which he was found a bankrupt, and the Plaintiff *Pell* was duly appointed the assignee of his estate. At the time of the bankruptcy, *Stephens* had put in a distress upon the mortgaged premises, for the purpose of obtaining payment of arrears of interest which, to the amount of 350*l.*, was then due to him on his mortgage. The Plaintiff, conceiving it would be prejudicial to the interests of the general creditors, and

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to the sale of the estate, that the distress should be suffered to remain upon the premises, entered into an arrangement, in execution of which, he wrote and gave to the mortgagee an undertaking in the following words: — “*Barby, September 4th, 1832. As assignee of the estate and effects of Richard Lord of Barby, a bankrupt, I hereby undertake, in consideration of Mr. Stephens withdrawing the person put into possession of Mr. Lord's effects under a distress for the sum of 350*l.*, due for interest reserved as rent to Mr. Stephens, that the said sum of 350*l.* shall be paid to Mr. Stephens out of the produce of the sale of the same effects.—George Pell.*” The Defendant, on the receipt of this undertaking, immediately withdrew the distress. Before, however, the Plaintiff could obtain possession of any portion of the effects on the farm, and before he had possessed any part of the bankrupt's estate, the fiat against *Lord* was annulled by an order of the Court of Review. *Stephens* soon afterwards brought an action in the Court of Exchequer upon the undertaking given by *Pell*, to which *Pell* pleaded the circumstances specially; but the Court, upon demurrer, held that those circumstances furnished no defence at law, and that *Pell*, upon the undertaking, was liable personally to pay the 350*l.* thereby guaranteed.(a)

It further appeared that at the time of the bankruptcy *Stephens* was under a contract, entered into in *February* 1832, for the purchase of another farm at *Barby*, also the property of *Lord*, at a price considerably exceeding the amount of the mortgage debt and interest, and upon certain terms specified in the contract. The memorandum of agreement for this purchase contained a proviso

(a) The case is reported in 4 *Tyr. 6.*, under the name of *Stephens v. Pell*.

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viso that nothing therein should prejudice the mortgage, or the principal and interest money thereby secured, except that *Stephens* should be at liberty to deduct the amount thereof from the purchase-money and also any further sums in which either *Lord* himself or his late father should be indebted to *Stephens*. This agreement had not at the time of the bankruptcy been carried into effect, by reason, as was charged in the bill, but positively denied by the answer, of the neglect and default of the Defendant *Stephens*.

The bill prayed that the Defendant might be restrained from any proceedings at law in respect of the undertaking; that, if necessary, an account might be taken of the sums received by him for interest upon his mortgage debt, and that what he had so received might be applied in satisfaction of the interest accrued thereon prior to the date of the undertaking; and that the memorandum of agreement might be deemed a security for what upon the balance of accounts might appear due to the Defendant; and that, in case the Plaintiff should be considered liable to pay such balance, the Defendant might be decreed to repay the same to the Plaintiff out of the purchase-money payable by him to *Lord* for the farm and premises which he had contracted to purchase from the latter.

Mr. *Pepys* and Mr. *Koe*, for the motion, admitted that, however hard the Plaintiff's situation might appear, if the case had rested merely on the circumstances upon which the question had been already determined at law, it might perhaps be difficult to shew a proper ground for the interposition of the Court; but the contract for the purchase of the other farm by the Defendant—a contract which had never been abandoned, and was still a valid and subsisting contract—materially improved the
 Plaintiff's

Plaintiff's position, at least in this Court. Under the circumstances stated in the pleadings, the Plaintiff, to the extent to which he had been found liable upon the undertaking, was substantially a surety for *Lord* the principal debtor, and he had a right in that character to avail himself of all the securities which *Stephens* the mortgagee had or might have against *Lord*. Now there was a clear equity, founded upon the special language of the proviso, that all monies due in respect of the mortgage, including of course the $\$50L.$, should be deducted out of the price contracted to be paid for the estate; in other words, the Defendant had in the purchase-money of the estate a security for payment of his mortgage-money and arrears; and the Plaintiff, having now paid off a part of those arrears, had a right to have the benefit of the security to that extent in the adjustment of the account with the principal debtor. The argument might be put in a point of view more consistent with the frame of the record by considering the Defendant as the debtor of *Lord* for the amount of the purchase-money, *minus* the sum due upon the mortgage; and then the mortgagor, in his character of vendor, was in a situation to treat the mortgage-debt as in effect a security for the price of the farm contracted to be sold, and to deduct it from the purchase-money; and the Plaintiff, to the extent to which he had paid off that debt for *Lord*, had a right to stand in his place, and to have the benefit of the same equity.

Mr. *Wigram* and Mr. *Blunt*, *contra*, insisted, that if the judgment of the Court of Exchequer was wrong, as there might be grounds for contending, the Plaintiff had still his remedy by writ of error. If, however, he were liable at law, the mere hardship of his case could not entitle him to relief in this Court. Neither did the
other

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other circumstances alleged as giving him an equity in the least degree better his situation. The Plaintiff was simply a creditor of *Lord* by having paid off liabilities of his to the amount of 350*l.*, but what right could that circumstance give him to call for an account of what was due as between *Lord* and *Stephens*, in respect of the mortgage, or to demand as against *Stephens* that a portion of the price of the farm which *Stephens* had agreed to purchase, should be appropriated to the discharge of the Plaintiff's claim against *Lord*? The mortgage and the transaction for the sale were wholly distinct matters, and applied to distinct properties. The contract for the purchase was a transaction as to which there was no privity whatever between the Plaintiff and Defendant, and resting entirely between *Lord* and *Stephens*, who might, if they chose, abandon it at any moment. If therefore any such equitable lien as was pretended did really exist, it could only be asserted upon a bill filed to enforce a specific performance of the contract, and to which *Lord* the principal debtor would be a necessary party.

Dec. 20.

The LORD CHANCELLOR.

A., assignee of *B.* a bankrupt, gives an undertaking to *C.*, a mortgagee of *B.*'s estate of *Blackacre*, and who for arrears of 350*l.* had put in a distress, and had a man in possession, that if *C.* would give up possession, he, *A.*, would indemnify *C.* to the amount, which was 350*l.* The undertaking is given "as assignee," and it is to indemnify *C.* out of the sale of the effects taken possession of by *C.* *C.* delivers up possession upon this undertaking, thus executing the consideration on his part. The fiat under which *B.* was made a bankrupt is

is then annulled, and *A.* never obtains any of the effects at all. But the Court of Exchequer have held the undertaking to be personal, and *C.* has recovered against *A.* to the amount.

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A. now files his bill against *C.* for an injunction to stay execution, and besides the before-mentioned matters, upon which it is not contended he could rest his claim to the assistance of this Court, he further states, that before the bankruptcy, *B.* and *C.* had executed an agreement for the sale by *B.* to *C.* of his other farm of *Whiteacre*, but without prejudice to the mortgage of *Blackacre* further than that *C.* should be at liberty to deduct from the purchase-money for *Whiteacre* the amount of the mortgage-money on *Blackacre*. One party asserts, and the other by his answer denies, that the delay in completing the purchase has been owing to *C.*, who alleges that there is a defect in the title.

If an injunction be granted on such a ground, is not this the consequence,—that the mortgagee of any estate, by agreeing to become the purchaser, abandons his right to sue at law upon the specialty until an account can be taken between him and the mortgagor as vendor, and thus hangs up his rights under the mortgage to abide the event of a suit which may arise upon the agreement to purchase; or at all events to wait until a good title can be made; whereas his rights as mortgagee, or on the specialty, are quite independent of the question of title?

But here the case is stronger; for the mortgaged premises are *Blackacre*, and the premises agreed to be purchased are *Whiteacre*; so that the rights of the mortgagee of the former are to be hung up on account of the difficulties arising as to the title to the latter.

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The injunction is chiefly asked on account of this agreement to purchase, and on the ground that *A.* by the undertaking on which he has been sued at law has become a surety for *B.*, and is entitled to stand in his shoes, and to have the benefit of all his equities as against the Defendant *C.*, who stands to *B.* in the double relation of purchaser of one estate and mortgagee of another; and it is not necessary to dispute that the Plaintiff may be taken to be such surety, and to have such equities as *B.* would have; because, for the reason which I have given, *B.* himself would not have the right contended for.

The motion must therefore be refused; but not on the ground to which reference was at first made by me when I heard the case stated, and before the argument was concluded; namely, that for any thing I could see, there might be relief at law. I desired to be furnished with a note of the argument in the Exchequer, but I have not been able to obtain it. I have however considered the point, and I think there can be no doubt that the decision on the demurrer was right.

It is true that the party agreed "as assignee" of the bankrupt; and what is stronger, he agreed to pay "out of the produce of the sale of the effects under the distress." But the other party, on the faith of the undertaking, immediately performed the consideration of the agreement, by abandoning the goods of which he had possession, and he has a good right to be placed in the same situation in which he stood before he gave up the possession. The undertaking must be construed as not only guaranteeing the value of the goods, but, if necessary for working out the other party's remedy, it must be construed as a guarantee that he who gave it had such a character as he assumed, namely, that he

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was truly and rightfully the assignee, and that he had the right to the goods out of which he was to furnish the indemnity; in other words, he must be taken to have guaranteed his own title, that is, the validity of the commission, of the frailty of which indeed he must also be taken to have been cognisant. A person may bind himself for the act of another, or to pay out of a fund not his own, and will be liable in either case. There is a decision in the Court of King's Bench, *Eaton v. Bell* (a), as strong in principle as this, and stronger by a good deal in its application to the present case than *Appleton v. Binks* (b), and the other cases which are said to have been referred to.

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There was therefore no relief at law; and if the party applying here had an equity to be relieved, he could not be met by the argument that the courts of law were open to him. But I am of opinion that he has no such equity, and that the motion must be refused.

The case is in some respects a hard one; but the hardship is not as between the Plaintiff and Defendant, but the Plaintiff and a party not in Court, the bankrupt, now no longer such, against whom the Plaintiff still has his recourse, although possibly it may avail him little.

(a) 5 B. & Ald. 34.

(b) 5 East, 146.

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Nov. 12.

ATTORNEY-GENERAL v. DIXIE.

The Court has jurisdiction to extend the application of the income of charity property beyond the mere literally expressed intention of the testator, provided the income be applied to subjects connected with that intention.

IN this case an information had been filed by the Attorney-General for the purpose of executing the trusts of the will of a testator who had devised property for the establishment of a grammar school at *Market Bosworth*, and by a decree made at the hearing of the information, it was referred to the Master to settle a scheme for the future application of the income of the charity estate; and it appearing that it would be greatly for the benefit of the inhabitants of *Market Bosworth* that the scheme of education should be extended beyond the purposes of a mere grammar school, the decree directed that the scheme to be settled by the Master should not be confined to instruction in the learned languages, but should comprise other general branches of education. The Master settled the scheme accordingly, which was confirmed by the Court, and had been acted upon for several years. It now appeared that, after defraying all expenses of the scheme so settled by the Master, there remained from the income of the charity school a clear yearly sum of 500*l.*; and the question now submitted by the Attorney-General to the Court was as to the application of that sum.

The MASTER of the ROLLS.

This Court appears to me to have full jurisdiction to extend the application of the income of charity property beyond the mere literally expressed intention of the testator, provided the income be applied to subjects connected with that intention. In this case, therefore, let it be referred to the Master to consider of a further scheme

scheme for the application of the income of the charity estate, having regard to the testator's will, the former scheme, and other subjects connected with that scheme.

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ATTORNEY-GENERAL v. The DUKE of
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IN the year 1807 *Benjamin Clarkson* purchased of Lord *Lowther* a copyhold estate, held of the manor of *Wakefield*, for the sum of 3240*l.*; but, being unable to pay the whole of the purchase-money, he borrowed of *John Crosse* a sum of 1150*l.*, and paid the full price to Lord *Lowther*. The copyhold estate was surrendered to *Crosse* and his heirs; and *Crosse* was thereupon duly admitted. *Crosse* died in the year 1816, having by his will given all the residue of his personal property of what kind or nature soever, whether in the funds, on mortgage, or other securities, to the Plaintiff *George Burton*, whom he appointed his executor, upon trust to sell out such part of his property as consisted of stock, and expend the produce, together with all his other property, in furthering and promoting the cause of true religion among the inhabitants of *Great Britain* and *Ireland*. This devise being, as far as it affected his interest in the copyhold estate, void by the statute of mortmain, and *Crosse* having been illegitimate, the Crown claimed to be entitled to the 1150*l.* which *Crosse* had advanced to *Clarkson* upon the security of the copyhold estate.

Where a copyhold was surrendered to a mortgagee and his heirs, and no condition was expressed in the surrender, and the mortgagee died intestate and without an heir, it was held that the lord of the manor was entitled to enter upon the copyhold as an escheat.

A bill was filed by the executor of *Crosse* against the Attorney-General for an account of the testator's personal estate; and, by an order made in that cause, it was declared that so much of the testator's estate as was

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placed out on, or arose from mortgages, belonged to the Crown, and that the residue thereof was given to charitable uses; and by a subsequent order the Court directed that the Attorney-General should be at liberty to institute a suit for the purpose of establishing the title of the Crown to the said mortgages, and to use the name of the executor of *Crosse* as a co-plaintiff in such suit.

The present suit, by way of information and bill, was accordingly instituted by the Attorney-General and the executor of *Crosse* against the Duke of *Leeds*, who claimed to be entitled by escheat to the copyhold premises in question as lord of the manor, against *Sarah Clarkson*, the widow and executrix of *Benjamin Clarkson*, to whom the Duke of *Leeds* had made a regrant of the copyhold premises, and against *Alfred Clarkson*, the infant son and customary heir of the mortgagor. The information and bill prayed that the Defendants *Sarah Clarkson* and *Alfred Clarkson* might be decreed to pay to the Attorney-General and the Plaintiff the mortgage-money and interest, or concur in a sale of the premises for the payment of the same, and that the Duke of *Leeds* might be declared to be a trustee for his Majesty and for the person or persons entitled to the equity of redemption in the mortgaged premises.

The *Attorney-General* and Mr. *Wray*, in support of the information and bill.

Although the surrender is made absolutely to *Crosse* and his heirs, and is not, according to the usual form of mortgages of copyhold, a surrender upon condition, yet it is in substance to be considered as if it had been a conditional surrender. It is not denied that the mortgage-debt still existed, and the widow of *Clarkson* in fact continued to pay the interest on the mortgage
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until she received notice from the lord to discontinue such payment. If the surrender is to be considered as conditional, the lord was bound by the condition on the death of the mortgagee without heirs, and cannot claim to be entitled by escheat.

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It is a principle which may now be considered as settled, that, if the lord recognises a condition or trust upon the court-roll, he is bound by it, for he cannot claim against his own act. *Weaver v. Maule*. (a) Here it so happened that the condition on which the surrender was made was not expressed on the court-roll, and the question is, whether the lord is bound only where he has express notice of the condition; in other words, whether the lord is entitled in a court of equity to take advantage of the accidental omission to insert upon the court-roll the conditional nature of the surrender. The admission of the doctrine contended for on the part of the lord of the manor would, in such a case as the present, lead to the grossest injustice; for what can be more unjust, and more inconsistent with all the principles recognised in this Court, than that the lord should, by virtue of a slip in the form of the surrender, be enabled to claim an estate, not only against the Crown, but against the party entitled to the equity of redemption? There is strong ground for contending that the lord is as much bound as any other person by an equity of redemption, whether he has notice of it or not. In *Pawlett v. The Attorney-General* (b), Lord Hale distinguishes between a trust and an equity of redemption. As to a trust, he observes that they only are bound by it who come in in privity of estate, or with notice, or without a consideration.

(a) 2 *Russ. & Mylne*, 97.

(b) *Hard.* 469.

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sideration. But with respect to an equity of redemption, he says, "The power of redemption is an equitable right inherent in the land, and binds all persons in the *post*, or otherwise; because it is an actual right which the party is entitled to in equity. And although by escheat the tenure is extinguished, that will be nothing to the purpose, because the party may be recompensed for that by the Court by a decree for rent, or part of the land, or some other satisfaction; and it is of such consideration in the eye of the law, that the law takes notice of it, and makes it assignable or devisable." The doctrine laid down by Lord Hale in *Pawlett v. The Attorney-General* is referred to and approved by Sir Thomas Clarke, in the great case of *Burgess v. Wheate* (a); and the same distinction is there recognised between a trust and an equity of redemption, namely, that the lord is bound by a trust in those cases only where he is party or privy to the trust, but that an equity of redemption binds him whether he is privy to it or not, for that binds those in the *post* as well as those in the *per*. It is said, indeed, in *Burgess v. Wheate*, that there is a distinction in this respect between freeholds and copyholds; but there is no authority which decides that an equity of redemption will not bind the lord of a manor, as it binds all other persons, even though there be no notice of the equity of redemption on the court-roll.

The MASTER of the ROLLS considered the case too clear to require any argument in support of the title of the lord of the manor for whom Mr. Pemberton appeared.

The ATTORNEY-GENERAL declined making any further observations in support of the information.

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(a) 1 Blackst. 123. and 1 Ed. 177.

The MASTER of the ROLLS.

Upon the facts of this case it appears that *Crosse* was, by the effect of the surrender to him, a trustee of the copyhold estate for himself to the extent of 1150*l.*, and for *Clarkson* and his heirs after satisfying that sum. It was settled by the case of *Burgess v. Wheate* that a *cestuique trust* has no title as against the lord who claims by escheat upon the death of a trustee without an heir. The decision in *Burgess v. Wheate* proceeded upon the principle derived from the old feudal notion, that no tenant can be imposed upon the lord without his consent; and if a trust of a copyhold could be created as against the lord, it must necessarily follow that the lord might be entirely ignorant who was in truth the actual and beneficial tenant of the copyhold. It is for this reason that, in all mortgages of copyhold property, the surrender is upon the court-roll expressed to be conditional, and to determine upon the repayment of the mortgage-money. In this case the surrender was absolute. There was nothing upon the court-roll to give the lord notice of a condition, nor is there any proof that the steward or deputy-steward was aware of the real nature of the transaction.

The Duke of *Leeds* was therefore well entitled to enter upon the copyhold as an escheat upon the death of *Crosse* the apparent tenant to the lord without an heir.*

Information and bill dismissed, but without costs.

* The legal rights of lords of manors, in cases of escheat, are now subjected to the control of the Court of Chancery, in the manner provided by the 4 &

5 *W. 4. c. 23.*, passed on the 27th of June 1834, the sixth section of which is as follows:—"And whereas it is expedient to relieve persons beneficially entitled to

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real or personal property which has already escheated or become forfeited to his Majesty, to corporations, to lords of manors, or others, by any of the means aforesaid; be it therefore enacted, that in all cases where before the passing of this act any person possessed of or entitled to any land, chattels, or stock, or any right to or any interest in any land, chattels, or stock, as a trustee thereof, either in whole or in part, or jointly with some other trustee or trustees, shall have died without an heir, or shall have been convicted of any offence whereby the said land, chattels, or stock, or any of them, have escheated or been forfeited, or have become subject to any escheat or forfeiture, then and in every or any such case the said land, chattels, or stock, or the right thereto or interest therein which hath escheated or been forfeited, or become subject to escheat or forfeiture by reason thereof, shall be subject to the order, control, and disposition of the Court of Chancery, for the use of the party

beneficially interested therein, in such manner, and subject in all respects to such rights and incidents, and to such orders and regulations of the said Court, under the provisions of the said act of the eleventh year of King George the Fourth and of the first year of his present Majesty, as if such person so dead without an heir, or so convicted as aforesaid, were out of the jurisdiction of or not amenable to the process of the said Court without having been so convicted: Provided always, that nothing in this clause contained shall extend to any land, chattels, or stock now vested in any person by virtue of any grant thereof made subsequently to the time when such escheat or forfeiture first occurred, or to any land, chattels, or stock which more than twenty years prior to the passing of this act shall have been actually vested in possession, or reduced into possession by the party entitled thereto by virtue of any such escheat or forfeiture."

1834.

BURY v. PHILLPOT.

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Rolls.
Jan. 14.

WILLIAM PHILLPOT by his will, dated in 1797, gave an annuity of 60*l.* a year for the sole and separate use of his daughter *Ann Pollock*, to be paid to her by his executor in weekly payments, and after her decease, he gave the same to any child or children of her body, to be equally divided among them if more than one.

The bill was filed against the executor by *Mary Ann Bury* and by *James Gadsden* and *Jane* his wife, the female Plaintiffs claiming to be entitled in equal shares to the annuity of 60*l.* as the two daughters of *Ann Pollock* deceased; and the question in the cause was, whether they were legitimate children.

The testator's daughter had married her husband, *Pollock*, against her father's consent, in 1794. She and her husband disagreed, and in a few weeks after the marriage she returned to her father's house, and remained there until her father's death, which happened in the year 1800. The evidence on the part of the Defendant went to shew that, shortly after her father's death *Ann Pollock* formed a connection with a labouring man, named *Hughes*, with whom she cohabited, and that the children were born during such cohabitation. On the other side, there was evidence that the husband took a lodging opposite to the house in which his wife and *Hughes* resided, and that he had interviews with her from time to time, the object of which interviews, however, appeared generally to be to obtain money from her. On some of these occasions

Access is such access as affords an opportunity of sexual intercourse, and where there is evidence of such access between a husband and wife within a period capable of raising the legal presumption as to the legitimacy of an after-born child, the Court will not direct an issue upon evidence shewing the continued adulterous intercourse of the wife with another man, and the improbability of the husband being the father, but will declare the legitimacy of the child.

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1894.
 BURY
 v.
 PHILLIPOT.

the husband treated his wife with apparent kindness, but he generally conducted himself towards her with great brutality. The eldest of the children was baptised in 1802 as the daughter of *Alexander* and *Ann Pollock*; there was no evidence of the baptism of the other.

Mr. *Pemberton*, for the Plaintiffs.

The rule of law upon this subject, as it is to be deduced from the opinions of the judges in the *Banbury* peerage case, is clearly laid down in the case of *Head v. Head* (a). The corollary from those opinions is there said to be, "that wherever a husband and wife are proved to have been together at a time when, in the order of nature, the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was, *prima facie*, to be presumed; and that it was incumbent upon those who disputed the legitimacy of the after-born child to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place, and not by mere evidence of circumstances, which might afford a balance of probabilities against the fact that sexual intercourse did take place." To apply this principle to the present case, what is there to oppose to the admitted fact that interviews from time to time took place between the husband and wife? Is there any evidence of circumstances, affording irresistible presumption that the usual consequence of such interviews — that consequence which the law, founded upon, and confirmed by the experience of mankind, infers from such interviews — did not take place? Clearly not; the fact of the wife having maintained an adulterous inter-
 course

(a) 1 *Sim. & Stu.* 150.; affirmed on appeal, 1 *Turn. & Russ.* 139.

course for whatever period of time with another man affords no such presumption. Let the husband and wife be once brought together under circumstances, which afford the husband an opportunity of becoming the father of a child born in due time afterwards, and the law will fix the husband with the paternity, though the wife may have slept with another man every night in the year preceding, and the year succeeding the interview. The fact of access not being denied, there is no ground for disputing the claims of the Plaintiffs, or for resorting to a jury, which might, indeed, find a verdict inconsistent with law, but which could not by possibility assist the conscience of the Court in a case where the Court is already competent to determine, and bound to declare the rights of the Plaintiffs.

1884.
Bony
v.
Phillips.

Mr. Bickersteth, *contra*.

It is too unqualified a proposition to say, that any interview between a husband and wife, living separate from each other, at which the husband might by possibility avail himself of his marital privileges, will, in case of a child being born in due time afterwards, fix him with the paternity. That which is *prima facie* possible, or even probable, may appear, upon investigation, to be physically or morally impossible: physically, as in cases of bodily infirmity; morally, as where the circumstances or place of meeting render it in the highest degree improbable that sexual intercourse should have taken place. The inference of law may be rebutted by circumstances, not amounting indeed to proof — for a negative is incapable of proof — or perhaps to irresistible presumption, but still abundantly sufficient to satisfy any reasonable mind that sexual intercourse could not have taken place; and such circumstances can only be properly investigated by a jury. In *Morris v. Davies*,

1834.

 BURY
 v.
 PHILLPOT.

v. *Davies* (a), repeated issues were directed by Lord *Lyndhurst*, in order to satisfy the conscience of the Court upon the disputed fact whether interviews between the husband and wife had been such interviews as afforded an opportunity of sexual intercourse. This is exactly the fact upon which the conflicting evidence in the present case throws a doubt, and the case is therefore one upon which the Court cannot satisfactorily decide without the assistance of a jury.

Mr. *Pemberton* replied.

The MASTER of the ROLLS.

Access is such access as affords an opportunity of sexual intercourse; and where the fact of such access between a husband and wife, within a period capable of raising the legal inference as to the legitimacy of an after-born child, is not disputed, probabilities can have no weight; and a case ought never to be sent to a jury. There is here nothing against the evidence of access, except evidence of the adulterous intercourse of the wife with *Hughes*, which does not affect the legal inference; for if it were proved that she slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate. The interest of the public depends upon a strict adherence to the rule of law.

(a) 3 *Carr. & Payne*, 218, 427.

1835.

GIBBS v. HOOPER.

1835.
Feb. 12, 13.

THIS was a motion for a new trial of an issue which had been directed upon the question, whether *Christian Anderton*, one of the Plaintiffs in the cause, was the legitimate daughter of *John Moore* and *Christian* his wife. The motion was made upon two grounds: first, that the verdict was against the weight of evidence; and, secondly, that the testimony of a particular witness produced at the trial was, under the circumstances, a surprise upon the parties interested in contesting the legitimacy of *Mrs. Anderton*. The Vice-Chancellor had refused a new trial; and the present motion was made upon appeal from his Honor's decision.

The learned Judge, who tried the issue, had intimated to the Vice-Chancellor that he was not dissatisfied with the verdict, though he should himself have come to a different conclusion had he been upon the jury; and the Lord Chancellor, in an early stage of the argument, expressed an opinion that the application could not be sustained upon the first ground.

In support of the second ground for the application, it was insisted that a witness named *Dale* had been called to prove a fact for the purpose of making out a case of

Where the Judge who tried the issue stated that he was not dissatisfied with the verdict, though he should have found otherwise, had he been himself upon the jury, the Court would not direct a new trial of the issue, if the application for a new trial rested solely upon the ground that the verdict was against the weight of evidence.

At the trial of an issue on a question of legitimacy, a witness was called to prove a fact, shewing that there might have been access between a husband and

wife at a particular place and time. This witness had not been examined in a suit in the ecclesiastical court, to which the mother of the child whose legitimacy was disputed was a party, and in which his evidence would have been material to her; nor was any attempt made by her in that suit to establish the case of access, which his testimony went to make out. The testimony of this witness was a surprise upon the party against whom it was produced, and its accuracy being impeached by affidavits, the Court directed a new trial of the issue.

1835.

 GUARD
 v.
 MOORE.

access at a particular place, for which the parties disputing the legitimacy of *Mrs. Anderton* could not have been prepared. It appeared upon the trial, that a writ of inquiry to assess the damages obtained by *Mr. Moore* in an action for criminal conversation against *Caulfield*, with whom *Mrs. Moore* had eloped, was executed in *Worcester* on the 13th of *July* 1796. *Mr. Moore* and his wife were both in *Worcester* on that day; and it was sworn by one of the witnesses that an interview took place between them at the *Crown Inn* in that city. *Mrs. Moore* and *Caulfield* occupied lodgings in the *Strand*, at the house of a person named *Bebb*, between the months of *June* and *September* 1796; and *Bebb's* son swore that *Mrs. Moore* was never absent from home, during her occupation of the lodgings in his father's house, for a longer period than four or five days, which were sufficient to account for the journey to and from *Worcester*. The child, whose legitimacy was in question, was born on the 3d of *May* 1797, 294 days after the day on which the writ of inquiry was executed, that time being about a fortnight longer than the full time allowed for the period of gestation. A witness, *Dale*, however, was called to prove that he saw *Mrs. Moore* in the town of *Dudley*, which was the town where her husband resided, twelve or thirteen days after the day on which the writ of inquiry was executed. The ground upon which this testimony was contended to be a surprise upon the party insisting on the illegitimacy of *Mrs. Anderton*, was, that in 1798, and shortly after the death of her husband, *Mrs. Moore* was a party to a suit instituted in the Ecclesiastical Court for the purpose of obtaining administration to her husband's estate, in which the mother of her deceased husband claimed to be his sole next of kin, which she would have been, if the widow had no legitimate child; and it was consequently material to *Mrs. Moore*, the widow, to establish
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the legitimacy of her daughter. *Dale* was not examined in that suit; nor did Mrs. *Moore* attempt to make out a case of access at the place and time which *Dale's* testimony went to render probable or possible. Affidavits were read on the part of several persons who were living at *Dudley* at the time to which *Dale's* testimony referred, and who stated that Mrs. *Moore* had, to the best of their knowledge and belief, never been at *Dudley* since her elopement, and that, considering the notoriety of the circumstances connected with her elopement, and the state of society in the town, it was impossible that she could have been seen publicly in the streets of *Dudley* without their knowledge.

1855.
GIBBS
v.
HOOPER.

Mr. *Knight* and Mr. *R. V. Richards*, in support of the motion.

Mr. *Serjeant Talfourd* and Mr. *Whateley*, *contra*.

In the course of the argument the following cases were cited: *Head v. Head* (a), *The Banbury Peerage Case* (b), *Morris v. Davies* (c), *Bury v. Phillpot*. (d)

The LORD CHANCELLOR.*

If this application had rested solely upon the ground that the verdict given by the jury was against the weight of evidence produced at the trial, as the judge has stated that upon the whole he was not dissatisfied with that verdict, which is the usual form in which judges intimate their opinion that a verdict ought not to be disturbed,

(a) 1 *Sim. & Stu.* 150., and (c) 3 *Carr. & Payne*, 218. 427.
1 *Turn. & Russ.* 138. (d) *suprà*, p. 347.
(b) 1 *Sim. & Stu.* 153.

* Lord Lyndhurst.

1895.

GIBBS
v.
HOOFFER.

turbed, I should not direct a second trial of this issue. The only question is, therefore, whether a case of surprise, which is the other ground upon which this motion is founded, has been fairly made out. *Mrs. Moore* was an actress in a suit in the Ecclesiastical Court, in which it was most material for her to prove, that she was in such a situation, at the time to which the evidence of *Dale* applies, as would have led to the conclusion that sexual intercourse had taken place between her and her husband. She must have known whether she was at *Dudley*, but no attempt was made to establish such a fact, or even to suggest it. The parties in this cause naturally look to the evidence given at the time, and they see nothing in that evidence leading to the conclusion that she ever was at *Dudley* after her elopement. They had reasonable ground to suppose that the other side would endeavour to fix the sexual intercourse contended for at *Worcester*, because they knew that the husband and wife were together in that town; but they had no reason to suppose that such a case as *Dale's* evidence went to make out would be attempted; on the contrary, the proceedings in the Ecclesiastical Court were calculated to mislead them, and they were misled. It is to be observed, moreover, that all the witnesses still living who gave evidence in the Ecclesiastical Court were subpoenaed at the trial. Under these circumstances, there is every reason to suppose that the evidence of *Dale* was a surprise upon the parties disputing the legitimacy of *Mrs. Anderton*. They state that they can call witnesses for the purpose of opposing his testimony; they give the names of those witnesses, and the substance of their testimony, and some of these witnesses themselves state, that, from their knowledge of the state of society in the town of *Dudley* at the time in question, which was very different from its present state, it was impossible for *Mrs. Moore* to have been seen publicly in the town at
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the time sworn to by *Dale* without their knowing it. This is most material and important evidence, and the jury ought to have an opportunity of considering that evidence, and weighing it against the testimony of *Dale*. What conclusion they may draw, it is not for me to say, nor shall I anticipate. I give no opinion whatever on the subject of the issue, but I think it incumbent upon me, under all the circumstances, to direct a new trial.

1835.
GIBBS
v.
HOOPER.

PHILANTHROPIC SOCIETY v. HOBSON.

1833.
ROLLS.
Dec. 15.

THE bill was filed for the payment of a legacy given to this society by the testator's will. The executor, in his answer, admitted assets for the payment of the legacy; and the Court being about to decree for the payment of the legacy with costs,

An admission of assets for the payment of a legacy is an admission of assets for the purposes of the suit, and extends to costs, if the Court thinks fit to give them.

Mr. *Bickersteth*, for the Defendant, objected that the executor had not sufficient assets to pay the costs.

The MASTER of the ROLLS.

The admission of assets for payment of the legacy is an admission of assets for the purposes of the suit, and prevents all accounts being taken. It extends, therefore, to an admission of assets for the payment of costs, if the Court think fit to direct them, and here costs are according to the course of the Court.

The decree was, accordingly, made for the payment of the legacy with costs.

1835.

1835.
ROLLS.
Feb. 16.

PUGH v. PUGH.

The Court will not order the serjeant-at-arms upon a return of *non est inventus* upon any other affidavit than that of the solicitor or his town agent, stating that due diligence has been used in endeavouring to apprehend the Defendant, as required by 1 W. 4. c. 36. s. 1. The affidavit of the town agent, shewing that he issued the writ, and of the sheriff's officer, shewing the steps taken by him to apprehend the Defendant, and the manner in which his endeavours were eluded, will not be sufficient.

MR. WILSON moved for the serjeant-at-arms upon a return of *non est inventus* to a writ of attachment against the Defendant *Pugh* for not putting in an answer to the amended bill. The motion was supported by an affidavit of the solicitor's town agent, stating that he had issued the writ, and that he verily believed the Defendant was in the county of *Middlesex* at the time of issuing such writ; and also by an affidavit on the part of the sheriff's assistant, stating the steps he had taken, in consequence of information he had received that the Defendant was to be found in a particular house in the county of *Middlesex*, in order to attach the Defendant, and the manner in which his endeavours to execute the writ had been eluded by a female residing in the house.

The MASTER of the ROLLS* inquired whether there was an affidavit on the part of the solicitor or his town agent, stating that due diligence had been used in endeavouring to apprehend the Defendant, as required by 1 W. 4. c. 36. s. 15. rule 1.

Mr. Wilson said he had not an affidavit in those terms; but he submitted that, as the best evidence of due diligence having been used was that of the sheriff's officer himself, the legislature could never have intended that the secondary evidence of the solicitor, who could only derive his information from the officer intrusted with the execution of the writ, should be indispensable.

The

* Sir C. Popham.

CASES IN CHANCERY.

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The MASTER of the ROLLS said, that the act had expressly pointed out the persons with whose evidence the Court was to be satisfied; and no other evidence, therefore, could be satisfactory.

1833.
PUGH
v.
PUGH.

Motion refused.

CULLINGWORTH v. GRUNDY.

1834.
Jan. 14. 17.

MR. *K. PARKER* requested to have the judgment of the Court upon a point which had arisen in this case, and which, he observed, was of considerable importance in practice; namely, whether under the authority of the 3 & 4 *W. 4. c. 94.*, and the twentieth of the new orders, issued on the 21st of *December 1833*, founded upon that statute, the common application for leave to amend before answer, ought to be made as a motion of course in court, or whether it should be made before the Master like special applications for leave to amend.

The jurisdiction of the Court to make orders upon motions of course is not taken away by the operation of the 3 & 4 *W. 4. c. 94. ss. 13. and 14.* and the new orders founded thereupon,

The LORD CHANCELLOR said he should look into the act of parliament, in pursuance of which the orders referred to had been framed, before he decided the point.

The LORD CHANCELLOR.

Jan. 17.

After fully considering the subject matter of the thirteenth and fourteenth sections of the statute, and after consulting with the learned judges who preside in the other branches of the Court, I have come with them to the conclusion, that the jurisdiction of this Court is not excluded by the operation of the four-

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teenth

1834.
 CULLING-
 WORTH
 v.
 GRUNDY.

teenth section. That section, which alone could be contended to have taken away the jurisdiction, takes it away, if at all, only by reference to the preceding section; and the question then comes to be, what is it which is done by the thirteenth section?

The first ground on which it appears that the thirteenth section is to be confined in its operation to cases of special applications is the use of the words "hear and determine," which are found there. These words are any thing but correctly descriptive of an order made upon a motion of course; although, perhaps, if the matter had rested there, I might have felt a difficulty in saying that the language sufficiently defined the nature of the applications intended, to the exclusion of motions of course. But then comes the latter part of the section, which contemplates a very different matter,—the appeal given to the Chancellor, the Master of the Rolls, and the Vice-Chancellor, from such determination, and from the Master, by whom it has been made. And the fourteenth section immediately follows, and excludes the jurisdiction of the Court in every way unless upon appeal; so that the consequence of holding that the thirteenth section deprived the Court of its authority in such a case would be this, that the fourteenth section would not merely exclude the jurisdiction of the Court in these matters, but would expressly state that the only jurisdiction which the Court possessed was an appellate jurisdiction upon orders of course, a consequence utterly absurd.

Upon these grounds we are unanimously of opinion that the jurisdiction of the Court is not excluded in this case.*

* The 13th and 14th sections of the 5 & 4 W. 4. c. 94. are as follows:—

13th, "And be it further enacted, that the Masters in ordinary of the High Court of Chancery

Chancery shall hear and determine all applications for time to plead, answer, or demur, and for leave to amend bills, and for enlarging publication, and all such other matters relating to the conduct of suits in the said Court as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and Vice-Chancellor, or one of them, shall by any general order or orders direct, in such manner and under such rules and regulations as by any general order or orders to be also issued by the Lord Chancellor, with the

advice and assistance aforesaid, shall be directed; and that it shall be lawful for either party to appeal by motion from the order made on such application to the Lord Chancellor, Master of the Rolls, or Vice-Chancellor, and that the order made on such appeal shall be final and conclusive."

14th, "And be it enacted, that no such application as above mentioned shall in future be heard by any of the Judges of the said Court of Chancery except on appeal as hereinbefore provided."

1834.
CULLING-
WORTH
v.
GRUNDY.

1835.

Feb. 16.

WHARTON v. SWANN.

If after replication filed, the Plaintiff has on special leave amended his bill in such a manner as to call for an answer, he may afterwards obtain, as of course, a further order to amend at any time before the answer to the amended bill is put upon the file.

ON the 21st of *November* 1831, the Plaintiff filed his original bill in this cause. On the 14th of *May* 1832, the Defendants, *Swann, Norrison, Smithson, and Otley*, put in their answers. On the 14th of *March* 1833, the Defendants having obtained an order to dismiss the bill for want of prosecution, the Plaintiff gave the usual undertaking to speed, and filed a replication. On the 14th of *June*, the Plaintiff, by a special order, obtained leave to withdraw the replication and amend his bill, and also to file a bill of revivor against the representatives of the Defendant *Swann*, who had died; and on the 25th of the same month the bill of revivor was put upon the file, and the original bill was at the same time amended, pursuant to the order of the 14th of *June*. The amendments were numerous and extensive, and rendered a fresh engrossment necessary. On the 5th of *September* 1833, the Defendants obtained an order for six weeks' time to answer the amended bill. On the 12th of *June* 1834, an order was made that the suit should stand revived as against the executors of *Swann*. On the 5th of *August* following the Plaintiff obtained a common *ex parte* order to re-amend his bill; and on the 26th of the same month the re-amended bill, which was greatly enlarged and required a second reengrossment, was put upon the file.

Mr. *Barber* and Mr. *Wakefield* now moved, on behalf of different Defendants, that the order of the 5th of *August* 1834 might be discharged for irregularity, and that the re-amended bill, filed in pursuance of that order,

order, might be taken off the file with costs. The question depended upon the construction to be put on the thirteenth of the new orders, as that order existed in its revised form, published in *November 1831*.^{*} It was there expressly provided, that after answer and before replication, which, as the replication had been by leave withdrawn, was, in fact, the present case, one order only to amend should be obtained as of course; and surely the circumstance that the preceding order to amend was special, ought not to put the Plaintiff in a better situation. An order for a second amendment could only, under such circumstances, be obtained upon a special application; *Tarleton v. Dyer*.^(a) If it were held that, after answer and replication filed, and after the replication had been by special leave withdrawn for the purpose of allowing a new case to be made by amend-

1835.
WHARTON
v.
SWANN.

* The order is as follows:—
“ That after an answer has been filed, the plaintiff shall be at liberty, before filing a replication, to obtain upon motion or petition without notice, one order for leave to amend the bill; but no further leave to amend shall be granted after an answer and before replication, unless the Court shall be satisfied by affidavit that the draft of the intended amendments has been settled, approved, and signed by counsel, and that such amendments are not intended to be made for the purpose of delay or vexation, but because the same are considered to be material to the case of the plaintiff;

such affidavit to be made by the plaintiff, or one of the plaintiffs where there is more than one, and his, her, or their solicitor, or by such solicitor alone, in case the plaintiff or plaintiffs from being abroad or otherwise, shall be unable to join therein; but no order to amend shall be made after answer and before replication, either without notice or upon affidavit, in manner hereinbefore mentioned, unless such order be obtained within six weeks after the answer, if there be only one defendant, or after the last of the answers, if there be two or more defendants, is to be deemed sufficient.”

(a) 1 *Russ. & Mylne*, 1.

1835.
 WHARTON
 v.
 SWANN.

amendment, the Plaintiff were to be at liberty to go on amending as often as he pleased, until an answer to the bill as last amended was on the file, the consequence would be, that such amendments might be made *in infinitum* upon orders of course; for each successive amendment which called for a fresh answer would keep alive the Plaintiff's right, and the whole object of the thirteenth order, which was framed for the express purpose of preventing vexatious delay and expense, would be effectually defeated.

Mr. Rolfe and Mr. Elderton, *contra*, contended, that after a bill was amended in such a manner as to call for a fresh answer, it became, in fact, a new bill, and that, till an answer to the bill so amended was placed upon the file, the thirteenth order had no application. The answer there mentioned was plainly to be understood as the answer which the Defendant was called upon to put in. If any mischievous consequences were found in practice to result from such a construction, they might easily be guarded against by a new order, or by putting the Plaintiff upon terms, whenever the Court, after replication, gave special leave to amend. The order of the 5th of August 1834, now sought to be discharged, was obtained on an *ex parte* application; but the attention of the Vice-Chancellor who made it was fully called to the circumstances, and his Honor then thought that the proceeding was regular.

- The LORD CHANCELLOR.*

At the close of the argument the impression upon my mind was, that the term "answer," used in the thirteenth of the new orders, referred to the answer to the amended

* Lord Lyndhurst.

amended bill; the answer to that bill which the party was bound to answer. I have since had a communication with the Vice-Chancellor with respect to his understanding on the subject, and I learn from him that the construction which he puts upon the language of the order coincides with my own; and that that construction, moreover, is, as he believes, consistent with the intention of the Judges by whom the order was framed. The motion must, therefore, be dismissed, but as it was a fair question to raise, without costs.

1835.
WHARTON
v.
SWANN.

ARNOLD v. ARNOLD.

ROLLS.
1854.
Nov. 12. 15.
1835.
Feb. 2.

THE will of *George Arnold*, a Lieut. Colonel in the service of the *East India Company*, bearing date 18th of *September* 1828, and executed in *India*, where he and his wife and family then resided, contained this pas-

sage :
The testator gave to each of certain infant nephews and nieces, by name, 400*l.* "with com-

pound interest at 5 per cent. per annum, from the day of their birth, to be settled on their marrying or attaining twenty-one years, whichever may first happen:" Held, that compound interest at 5 per cent. was to run on each of the legacies from the birth-days of the several legatees till their marriage or majority respectively, and not merely to the day of the testator's death.

A bequest of "my wines and property in *England*," held to pass the testator's property in *England* of every description, including money in the funds and at his banker's, debts, and arrears of a pension due to him, and not confined to property *ejusdem generis* with wines.

The testator desired that *A.*, *B.*, and *C.* might each enjoy, during life, the interest of 800*l.* sterling, the principal to devolve eventually to his residuary legatees. He directed the residue of his property to be divided into three equal parts, one part to each of his brothers and his sister; and if his brothers and sister should not survive him, or have legal issue living at the testator's death, then their shares to devolve in equal proportions to the survivors, as well as the shares that might have been devised to their issue. The testator's estate was not sufficient to pay the legacies in full: Held, upon the death of one of the tenants for life, that an apportionment of the legacy of 800*l.*, set apart to answer her life-interest, fell into the residue, and was not given over to the residuary legatees in their individual character; and that the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund.

1834.

ARNOLD
v.
ARNOLD.

sage: — “ I give and bequeath the following sums ; — to my dear wife, *Anne Martinez*, 1000*l.* sterling ; also my wines and property in *England*. To my dear child, *Sophia Mary Arnold*, 15,000*l.* sterling, to be kept in trust by my executors till she shall attain the age of twenty-one years, or marry,” &c. After giving directions with regard to the settlement of this sum upon his daughter’s marriage, and limiting it over in the event of her dying before the legacy became payable, the testator bequeathed a similar sum of 15,000*l.* sterling to any child of which his wife might be pregnant at his death, under the same stipulations. He then gave a number of pecuniary legacies to different relations, and among others the following : — “ To each of my dear nieces and nephews, if living at my death, *Eliza Mathilda Phipps*, *Eloisa Ann Phipps*, *Edward Constantine Phipps*, and *George William Phipps*, 400*l.*, with compound interest at 5 per cent. per annum from the day of their birth, to be settled on their marrying or attaining twenty-one years, whichever may first occur. Should any of them not marry or attain twenty-one years, the sums to devolve in like manner to the surviving children in equal proportions, failing which, to my residuary legatees.”

The testator died in *India*, on the 1st of *October* 1828. The bill was filed by his infant children, for the purpose of having the estate administered according to the trusts of the will. On taking the accounts before the Master, it appeared that there would be a considerable deficiency of assets to answer the legacies given by the will.

In calculating the amount of compound interest due in respect of the several legacies of 400*l.* given by the testator to his nephews and nieces, all of whom were infants and unmarried at the time of his decease, the

Master

Master computed interest at 5 per cent. from the respective days of the births of such nephews and nieces to the date of his report; and the report was excepted to by the Plaintiffs upon that ground.

1834.

ARNOLD
v.
ARNOLD.

Mr. Bickersteth and *Mr. Piggott*, for the exception.

The computation of compound interest at 5 per cent. ought to have been confined to the interval between the respective births of the legatees and the 1st of *October* 1828, the day of the testator's death; and ought not to have been continued to the period at which the legacies were to become vested on the marriage or majority of the several parties. To suppose the testator meant that compound interest should run after his own decease upon so many legacies to infant relatives, is to ascribe to him a very improbable and inconvenient intention, and one which the words of the bequest by no means necessarily import. It would be impossible, indeed, for the trustees, whose duty it is, under the directions in this bequest, to appropriate and invest a sufficient sum to answer the legacies in question, to ascertain, or even to conjecture, what amount would be required for the purpose. The sums are expressed to be given to the nephews and nieces named in the will, "with compound interest at 5 per cent. per annum from the day of their birth." Till what time? Clearly till the testator's death, the time at which the will speaks, and which doubtless he had in view, as the period at which the value of the several legacies with their accumulated interest was to be ascertained; and at the end of a year from that period, the ordinary interest at 4 per cent. would, of course, become computable upon the aggregate sum due in respect of each. The direction, that the legacies were "to be settled on them on their marriage or attaining twenty-one years, which ever may first occur," has no natural connection with the period
up

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up to which interest is to be computed; but merely fixes the moment when the right of the legatee is to become absolutely vested, and when it will be the duty of the trustees to have the sum properly settled.

Mr. Bethell, *contra*.

The MASTER of the ROLLS * observed, that it was not very likely that the testator, after having anxiously provided that these legacies should bear an extraordinary rate of interest from the births of the respective legatees, a period prior to his own decease, should have meant entirely to omit the intervening period between his death and the time when the legacies were to become payable. A much more probable construction was that the testator had intended by the expressions he had used, to enlarge the benefit of the legacies by declaring that the interest should begin to run upon them at an earlier period than was usual, and that instead of simple interest at 5 per cent., compound interest should be calculated upon them at that rate. The exception ought therefore to be over-ruled.

The cause having come on for further directions, and also upon the petition of the widow, a question was made upon the effect of the testator's bequest to her of his wines and property in *England*.

It was found by a special report that the testator's property in *England* at the time of his decease consisted of the following particulars; viz. a sum of 734*l.* 17*s.* 6*d.* being cash and bills in the hands of his bankers; certain wines which the executors had subsequently given up to the testator's widow; a box containing wearing apparel; the

* Sir C. Pepys.

the sum of 800*l.* 10*s.* 1*d.*, new 4 per cent. annuities standing in the names of trustees; the sum of 36*l.* 18*s.* 6*d.*, the arrears of a pension payable out of the Exchequer; the sum of 50*l.* due on the balance of an account; and a reversionary interest in the dividends to accrue on the sum of 1715*l.* 12*s.* in the 3 per cents. during the life of another person.

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Mr. *Pemberton*, for the widow, argued that upon the true construction of the clause the bequest was of the testator's wines, including all wines whether in *England* or elsewhere, and of his property in *England*, and if so, no question could be raised upon the effect of the first bequest in cutting down the generality of the second. If, however, it were read as a gift only of his wines in *England*, still the subsequent word "property" must be allowed some operation, and as there was nothing *ejusdem generis* with the wines, (for even the box of clothes did not fall within that description,) the Court must necessarily understand the word property in its natural and ordinary sense, and would comprise under it all the particulars of which the Master's report had found that the testator's property in *England* consisted. The gift of the wines, besides, was coupled with a gift of property in a particular locality; and no authority could be produced in which a bequest of a testator's goods, &c., followed by another of all his property in a particular house or place, the will itself furnishing the restriction, had been held to cut down the operation of the second bequest to things *ejusdem generis* with the articles given by the first. *Roper on Legacies* (a), *Michell v. Michell* (b), *Campbell v. Prescott* (c).

Mr. *Bickersteth* and Mr. *Piggott*, *contra*, contended that the reason why the testator spoke of his wines was because

(a) Ch. 4. s. 1. vol. i. p. 218.
2d ed.

(b) 5 *Mad.* 69.
(c) 15 *Ves.* 500.

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because he imagined it was necessary to mention them expressly; but that upon the true and natural reading of the sentence the qualification superadded of being in *England*, equally applied to the wines as to the other property. It was, in effect, a gift of his wines and other property in *England*; and this at once disposed of the main argument for the widow. What was meant by things *ejusdem generis* with wines was not things that might be eaten and drunk, but moveables, and as the wearing apparel fell within that description, there was property in *England ejusdem generis* sufficient to satisfy the language of the will. If the testator meant to give his widow every thing he had in *England*, why did he not say so in unequivocal terms? A gift of all that belonged to him, or of all that was coming to him, would have placed the matter beyond doubt. There did not occur here, as in the cases referred to, any such sweeping words as would properly carry debts. If the decision in *Fleming v. Brook* (a), were good law, the question must be determined against the widow.

Mr. *Pemberton*, in reply.

In *Fleming v. Brook*, the decision depended upon a totally different principle, and one that can have no application here; namely, that the property claimed was not within the local limits prescribed by the will, the securities and receipts, though the symbols and representatives of property, not being considered to be themselves property; whereas, here, the Master, by a report which has not been objected to, has found that all the particular items claimed by the widow composed the testator's property in *England* at the time of his decease. It is asked, if he meant to use the term property in its enlarged sense, why did he not omit

(a) 1 *Scho. & Lef.* 318.

omit the gift of the wines. But if by wines he intended to pass his whole stock, as well that in *India* as in *England*, the mention of his wines was unavoidable. The presumption *primâ facie* is, that words are used in their ordinary legal sense; and unless, therefore, some extraordinary expression or strong implication to the contrary can be found in the context to control or cut them down, they must, in construction, be allowed their ordinary legal operation. Had the testator meant to confine his bequest to wines in *England*, the natural expression would have been "also my wines in *England*, and my property there." If the words do not render the restrictive construction imperative, or if the point is doubtful, it then becomes necessary to weigh the probabilities of the case. It is not denied that the words "in *England*" were applicable to other property as well as to wines. Indeed, the expression "property in *England*" would clearly pass every thing there, not excepting the wines, which, so far as they were at home, would pass, as was intended, under the word "property," the other wines passing by the previous specific gift of them. The rule according to which general words in a bequest, where they follow an enumeration of articles, are confined to things *ejusdem generis*, is founded on a highly artificial principle, and ought not to be extended; for it is a rule not consistent with the ordinary feelings and conduct, and frequently defeats the intentions of testators, who, after enumerating the principal particulars of which their property consists, generally sum up the whole by some comprehensive expression, for the very purpose of including and passing every thing which they may have accidentally omitted to specify. What can be more improbable than that, in the outset of the bequest, the testator should specifically mention wines with a view to restrict the sweeping expression which was to follow? No answer has been given to the argument arising out of the character of the second
 gift

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gift as a specific bequest, nor can any case be produced in which a specific bequest has been cut down upon the effect of antecedent gifts of a partial kind. Suppose it had stood as a bequest of the testator's wines and property in a particular house, can it be doubted that all the property in that house, including money, plate, jewels, books, and articles of every description, would have passed? And this is in principle exactly the same case.

*The MASTER of the ROLLS**, after stating the passage in the will upon which the question arose, and the substance of the Master's special report, proceeded:—


On the one side, it is contended that the widow, under this bequest of the testator's wines and property in *England*, takes nothing but the box of wearing apparel, on the ground of there being nothing else among the several articles and property in *England ejusdem generis* with the wines; on the other side, it is insisted that the terms are general, and apply to every description of property to be found existing in *England* at the time of the testator's decease.

On the part of the widow, it is first argued, that the bequest of the testator's wines cannot be considered as limited to wines in *England*, but that it includes all his wines wherever existing. I cannot, however, adopt that construction. It appears to me that the whole formed clearly one sentence, and that the wines, therefore, as well as the property subsequently spoken of, are limited to the locality of *England*.

The question then is, whether, assuming this to be the right construction, the expression, "my wines and property in *England*," will not include every description of

* *Sir C. Pepys.*

of property found to be locally situate in this country, or whether there be any rule which necessarily limits that property to articles of the same kind with the subject-matter of the previous gift.

1854.

 ARNOLD
 &
 ARNOLD.

That the mere enumeration of particular articles, followed by a general bequest, does not of necessity restrict the general bequest, is obvious, because, as has been stated, a testator often throws in such specific words, and then winds up the catalogue with some comprehensive expression, for the very purpose of preventing the bequest from being so restricted. Clearly, therefore, in the ordinary case, the gift of the wines would not be limited by the occurrence of the subsequent word "property," which, be it observed, is as large and comprehensive a term as can possibly be used.

The question then remains, whether the limit in point of place, imposed by the testator on the extent of the bequest, ought to make any difference; and I can find neither reason nor authority for holding that it should. Indeed, I have been unable to discover any instance in which the word "property" has been confined to articles of the description before enumerated, unless where other expressions occurred, from which it was clear that the word was not there used in its ordinary sense.

The cases on this subject naturally turn upon very nice distinctions; in most of them the general bequest sought to be restricted has been of "effects," and I know of none in which the question has arisen on the word "property," unless where it has been introduced by way of exception or qualification to the prior gift. *Jones v. Lord Sefton (a)* was a case of this kind, and the question there

(a) 4 Ves. 166.

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there turned entirely upon the extent of the exception. The same observation applies to *Fleming v. Brook*. (a) The question there was, not as to what was to be included under the term "property," but whether the money secured by a bond found in the testator's house was to be considered for the purposes of the will as property within the house; and the Court, in determining the question in the negative, proceeded on the ground that the habitation in which the bond was found was not the place where the money was, and, consequently, that the property sought to be excepted did not answer the description.

Cases of that nature have no analogy to the present; and I must, therefore, decide, in the absence of any authority or principle to the contrary, that the widow takes all the several descriptions of the testator's property which the Master has reported to have been in *England* at the time of his death.

1855.

Feb. 2.

The testator desired that A., B., and C. might each enjoy, during life, the interest of 800*l.* sterling, the principal to devolve eventually to

The same will concluded with this passage:—"I desire that Mrs. *Ann Fitch*, and her sister Mrs. *Edward Vassall*, the dear and valued friends of my sainted mother, and *Laura Vassall*, my own dear friend and adopted sister, may each enjoy, during life, the interest of 800*l.* sterling, the principal to devolve eventually

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(a) 1 *Scho. & Lef.* 318.

his residuary legatees. He directed the residue of his property to be divided into three equal parts, one part to each of his brothers and his sister; and if his brothers and sister should not survive him, or have legal issue living at the testator's death, then their shares to devolve in equal proportions to the survivors, as well as the shares that might have been devised to their issue. The testator's estate was not sufficient to pay the legacies in full: Held, upon the death of one of the tenants for life, that an apportionment of the legacy of 800*l.* set apart to answer her life-interest, fell into the residue, and was not given over to the residuary legatees in their individual character; and that the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund.

to my residuary legatees. The whole of my remaining property, real and personal, of every description whatever, including the lands which belong to me in *Upper Canada*, to be divided into three equal parts, one part to each of my dear brothers, *James* and *William Arnold*, and my sister *Sophia Phipps*. In case my said brothers and sister should not survive me, or have legal issue living at my death, then his, her, or their shares to devolve in equal proportions to the survivors, as well as the shares that may have been devised to such their issue."

1835.

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 v.
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The testator's estate was not sufficient to pay the legacies in full, and a sum had been apportioned to answer *Laura Vassall's* life-interest in the legacy of 800*l.*, and carried to an account, entitled "The legacy to *Laura Vassall* for her life." *Laura Vassall* died on the 28th of *October* 1834, and a petition was presented by *James Arnold* and *William Arnold*, two of the residuary legatees, and by the infant children of *Sophia Phipps*, deceased, praying that one third part of the capital sum which had been apportioned and set apart to answer *Laura Vassall's* life-interest in the legacy of 800*l.*, might be paid to *James Arnold* and *William Arnold*, and the remaining third carried to the separate account of the infant petitioners, and accumulated for their benefit.

Mr. *Bethell*, in support of the petition.

The testator has expressed his intention that the legacies of 800*l.* should, upon the decease of the annuitants, go to his residuary legatees, whom he afterwards names. The sum set apart, therefore, to answer the annuity of *Laura Vassall*, belongs to the petitioners; the Court, in effect, ascertained her rights by appropriating her share as one of the tenants for life of the reduced legacies, and that appropriation excludes the

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claim of the surviving legatees. It can make no difference, in construing this bequest, that the testator's estate has proved to be insufficient for the full payment of the legacies. The testator meant, no doubt, that his legacies should be fully paid, but it was no less his intention that his residuary legatees should get something; and it might well be to provide against the possible failure of the residue that he gave the petitioners, under the description of residuary legatees, but in their individual characters, the benefit of this bequest over. The authorities support this construction of the will. In *Farmer v. Mills* (a), a testator's estate was insufficient to pay annuities given by his will; and it was held, that the sums set apart to answer the reduced annuities were not applicable, upon the dropping of the lives of any of the annuitants, towards making good the deficiency of the other annuities, but belonged to the residuary legatees. *Scott v. Salmond* is an authority to the same effect. (b) There the legatee over of annuities, which had been rateably reduced in consequence of the deficiency of the testator's estate, was held by the late Master of the Rolls to be entitled to the fund released by the death of one of the annuitants, and that decision was affirmed upon appeal.

Mr. *Bickersteth* and Mr. *Piggott*, for the two surviving legatees.

The legacy is not given other to the petitioners *nominatim*, but it is given to them in their character of residuary legatees; and it was evidently the intention of the testator that the capital should form part of the residue. In the residuary clause, the testator gives the whole of his remaining property, of whatever description, to the petitioners. His remaining property must

(a) 4 *Russ.* 86.(b) 1 *Mylne & Keen*, 363.

must clearly be that which remains after satisfaction of the several legacies given to persons specifically named. The cases cited have no application. *Farmer v. Mills*(a), indeed, is an authority against the petitioners; for there the testator had expressly directed, by a codicil to his will, that, if his estate proved deficient, which upon reflection he considered probable, the annuities should be rateably reduced; and the Master of the Rolls said, that if the case had rested upon the will, the residuary legatees could have taken no benefit until the annuities were fully provided for. Here, there is nothing to indicate an intention that the legatees should not be fully paid; on the contrary, the words used by the testator, "that the principal should devolve eventually upon his residuary legatees," shew that, as well with reference to the legacies of 800*l.* as to every other part of his property, the residuary legatees were to take nothing, until all the purposes of the will were satisfied. No argument against the right of the surviving legatees can be founded upon the circumstance of *Laura Vassall's* interest in the legacy having been carried to her separate account; for it was carried to her account expressly for her life, and the Court did nothing to bind the rights of other parties after her decease.

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Mr. *Bagshawe*, for the executors.

Mr. *Bethell*, in reply.

There is this difference between the present case and other cases of a similar nature which have come under the consideration of the Court. This is not a charge of several annuities upon a common fund, and a gift over of the *corpus*, but a certain sum is taken out of the testator's general estate, and directed to be applied for the

(a) 4 *Russ.* 86.

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the benefit of certain individuals named, for life, and at their deaths for the benefit of other individuals, not named indeed, but designated by a particular description. The petitioners claim the fund, not as a portion of the residue, but as a specific gift wholly independent of the residue. In *Farmer v. Mills*, the testator foresaw, and alluded to the probability, that his estate would not be sufficient to answer all the annuities given by his will; and he directed, in favour of his residuary legatees, that the annuities should abate. Here the testator has accomplished the same end by different means; namely, by making a specific gift to his residuary legatees, independently of the gift of the residue; so that, in the event of deficiency, which he might equally have contemplated, the residuary legatees, who were his nearest relations, might not be wholly disappointed of his bounty.

*The MASTER of the ROLLS. **

The question is, whether the testator meant to give the principal sums of 800*l.*, which were to provide for the life-interest of the annuitants, to the petitioners in their individual character, by a particular description, or whether he intended that the capital sums, after the decease of the annuitants, should fall into the residue of his estate. The words used by the testator in the disposition of the capital sums, — namely, “the principal to devolve eventually to my residuary legatees,” — are not expressions likely to be used by any one who meant to give a legacy to any particular persons. The word “devolve” especially is an apt expression, if he meant that the capital should fall into the residue; but it is a term not properly applicable to a gift to particular legatees. To judge of the probability of his intending, by these expressions, to give the legacy to particular persons,

* Sir C. Pepys.

persons, let us see what the residuary gift is. He directs the whole of his remaining property to be divided into three equal parts; one part to each of his brothers, *James* and *William*, and his sister *Sophia*; and in case any of his said brothers and sister should not survive him, or have legal issue living at his death, then his, her, or their shares to devolve in equal portions to the survivors. There is, therefore, a very special provision as to the persons who are to take under the residuary gift. If the testator did not mean that the capital, which was to provide for the annuities, should go in the same way as the residue, he must have intended some particular persons to take it; but no particular persons are pointed out. The inference is, therefore, that he intended this sum of 800*l.* to become part of his residuary estate, and that the same persons, whoever they might be, who took the residue, should take this sum as part of his general estate. The cases which have been cited do not appear to me to furnish any argument against this construction. In *Farmer v. Mills*, the testator's codicil expressly provided that the annuities should be rateably reduced; and the Master of the Rolls observed that, but for that codicil, the residuary legatees could have taken no benefit until the annuities were fully paid. That case, therefore, is an authority against the petitioners; and *Scott v. Salmond* was decided upon special circumstances, which render it inapplicable to the present case.

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ARNOLD
v.
ARNOLD.

The effect of his Honor's decision would have been, strictly, the dismissal of the petition; but it was agreed to take a declaration in conformity with the opinion of the Court, that the surviving annuitants were entitled to have the deficiencies in their annuities satisfied out of the released fund, and that, subject thereto, that fund fell into the residue.

1895.

ROLLS.
Feb. 16.

CURLING v. PERRING.

Motion for the production of correspondence, referred to in the answer, between the solicitor of the Defendants and a person not a party to the suit, refused.

THIS was a bill for the specific performance of an agreement to purchase certain annuities for the life of *Hungerford Luttrell*, and also a policy of insurance effected on his life; and the defence made by the Defendants in their answer was, that for some months previous to the execution of the agreement, *Luttrell* had been in communication with the *African* committee for the purpose of obtaining an appointment to *Sierra Leone*; that he was, in fact, about to proceed to that part of the *African* coast; that he was in such a state of health as would render it impracticable for him to obtain a licence from the insurance office to go abroad, and especially to such a climate; and that those facts were known to the Plaintiff, and fraudulently concealed from the Defendants.

Mr. *Wood* moved, on the part of the Plaintiff, for the production of certain letters addressed by the solicitor of the Defendants to *Hungerford Luttrell*, and the answers of Mr. *Luttrell* thereto, which letters were in part set out in the Defendants' answer, and admitted to be in their possession.

Mr. *Goodeve* opposed the motion, on the ground that the letters in question were privileged communications between the solicitor of the Defendants and Mr. *Luttrell*, made after the dispute had arisen between the parties.

Mr. *Wood*, in reply, insisted that the correspondence question was not a correspondence between solicitor and

and client, but between the solicitor of the Defendants and a third party, on a matter directly relating to, and essential to the establishment of, the Plaintiff's title; and that there was no case in which it had ever been held that a communication between a solicitor and a person who was no party to the suit was protected on the ground of privilege.

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PEPPERS.

*The MASTER of the ROLLS** decided that the correspondence, having taken place after the dispute which was the subject of litigation had arisen between the parties, formed no part of the Plaintiff's title, and that the Plaintiff was not entitled to the inspection of it. If the right of inspecting documents were carried to the length contended for by the Plaintiff, it would be impossible for a defendant to write a letter for the purpose of obtaining information on the subject of the suit, without the liability of having the materials of his defence disclosed to the adverse party.

Motion refused, with costs.

* *Sir C. Pepys.*

1885.

ROLLS.
Feb. 16.

EVANS v. OWEN.

A party may take exceptions to the Master's report of impertinence at any time before the impertinent matter is actually expunged; and the practice in this respect is not altered by the twenty-second of the last new orders, which provides that impertinent matter shall not be expunged until the expiration of four days from the filing of the report, "in order that the adverse party may have an opportunity of filing exceptions to such report."

MR. *PARKER* moved for the discharge of an order, obtained by the Plaintiff, to set down exceptions to the Master's report upon a reference for impertinence. The Master was attended on the 22d of *December*: on the following day he made his report that the matter was impertinent; and on the 12th of *January*, being the day on which the office re-opened after the holidays, the report was filed. On the 17th, a warrant to expunge the impertinence, and tax costs, was taken out by the Defendant, and served upon the Plaintiff on the same day. On the 21st of *January*, the Plaintiff obtained an order for liberty to set down exceptions to the Master's report. This order, he submitted, was obtained in contravention of the twenty-second of the last new orders, which provides, that every order to refer for impertinence shall contain a direction to the Master to expunge matter which he shall find impertinent, and tax costs; "but such scandalous or impertinent matter shall not be expunged, nor costs taxed, until the expiration of four days from the filing of the report of such scandal or impertinence, in order that the adverse party may have an opportunity to file exceptions to such report." (a) The Master was not to expunge the impertinence until after the time specified, in order that the adverse party might have an opportunity to file exceptions. Here the Plaintiff had not availed himself of the opportunity of filing exceptions; he had suffered the four days to elapse without excepting,

(a) Orders in Chancery, 1 *Mylne & Keen*, Appendix, p. xi.

ing, and it was too late to take exceptions after the expiration of that time.

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Mr. *J. Russell*, for the Plaintiff, contended that there was no ground whatever for this application. The practice, before the new orders, as to exceptions to reports of impertinence, was clearly laid down in *Norway v. Rowe* (a), where Lord *Eldon* said, that exceptions cannot be taken after the Master has once expunged; but until the impertinence is actually expunged, exceptions may still be taken, notwithstanding the order to expunge has been obtained. The twenty-second order did not vary the practice in this respect. The Master was now authorised, under one and the same order, to examine the matter referred for impertinence, and to expunge it, if found impertinent; and, lest the other party should be precluded by too rapid a proceeding from filing exceptions, it was provided that the Master should not expunge until after the expiration of four days from the filing of the report. But it was still competent to the party, according to the rule laid down by Lord *Eldon*, to take exceptions at any time before the impertinence was actually expunged.

*The MASTER of the ROLLS.**

This motion proceeds upon the supposition that the twenty-second order renders it imperative upon the party intending to except to the Master's report to file his exceptions within four days from the filing of the report. There is nothing in the twenty-second order to support that supposition. The object of the order is, to

save

* Sir *C. Pepys*.

(a) 1 *Mer.* 135.

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v.
OWEN.

save to parties the expense of an order to refer and another order to expunge, one order being now sufficient for both purposes. That the party against whom the report of impertinence is made may not be precluded from taking the opinion of the Court, if he thinks proper to except to the report, it is provided that the matter found to be impertinent shall not be expunged until after the expiration of four days from the filing of the report. The Master cannot expunge until after four days have elapsed from the filing of the report, but the order nowhere declares that a party may not except after the four days, if the other side shall not have acted upon the report. The rule has always been that, so long as the impertinent matter remains upon the record, it is competent to a party to take exceptions, and that rule is not altered or affected by the twenty-second order.

Motion dismissed with costs.

1835.

TINDAL v. COBHAM.

ROLLS.
Feb. 16.

THE bill was filed by the assignee of the vendor for the specific performance of an agreement to purchase an estate for the sum of 600*l*. By the terms of the agreement the Defendant was to take possession of the estate upon having a good title made out; and he was to pay 5 per cent. upon the purchase-money from the time of taking possession, if the purchase-money were not immediately paid. The Defendant took possession in *July* 1831, with the consent of the vendor. Shortly after the execution of the agreement, an abstract was delivered to the Defendant, and objections were taken on the part of the Defendant to the title, which were not removed in *May* 1832, when the vendor took the benefit of the Insolvent Debtors' Act, and the Plaintiff was appointed his assignee. The Defendant continued in possession of the estate, and had neither paid the purchase-money, nor any part of the interest upon the purchase-money.

A purchaser, who had been three years in possession, and who had not paid the purchase-money on the ground that a good title had not been made out, was ordered either to pay the purchase-money within two months, or to give up possession.

A motion was now made that the purchase-money might be paid into Court; and *Wickham v. Evered* (a) and *Younge v. Duncombe* (b) were cited as authorities to shew, that a purchaser could not keep possession of the estate, and of the purchase-money too. In *Wickham v. Evered* the purchaser was ordered to pay in the purchase-money within a month, if he elected to retain possession. *Younge v. Duncombe* was a much stronger case; for there a part of the contract was, that 5000*l*.,

part

(a) 4 *Mad.* 53.(b) 1 *Younge*, 275.

1835.

 TINDAL
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part of the purchase-money amounting in the whole to 6300*l.*, should be secured by a mortgage of the estate payable at not less than twelve months from the date of the conveyance. The purchaser, however, was, upon motion, ordered to pay in the whole purchase-money within two months.

On the part of the Defendant it was insisted that, by the terms of the agreement, the purchaser was not to pay the purchase-money until a good title to the estate was made out; and that the non-completion of the purchase had arisen from the delay on the part of the Plaintiff to answer queries and objections taken to the title up to *May* 1832, and, since that period, by the state of circumstances occasioned by the Plaintiff's insolvency.

Mr. *Pemberton* and Mr. *Wilbraham*, in support of the motion.

Mr. *Bickersteth*, *contra*.

*The MASTER of the ROLLS.**

The Defendant must make his election either to pay the purchase-money, or give up possession; and let him make that election within two months. The Plaintiff is entitled to the immediate payment of interest at 5 per cent. upon the purchase-money, to be calculated from the time at which the Defendant took possession.

* Sir *C. Pepys*.

1835.

SPICER *v.* JAMES.

Jan. 16.

THIS was a suit instituted by a creditor, on behalf of himself and all other creditors, for an account of the personal estate of an intestate, and the payment of his debts. The Defendant was another creditor, who had taken out letters of administration of the intestate's estate and effects, and who, by his answer, stated that he had himself a demand as a creditor against the estate, and claimed to be entitled, in right of his office of administrator, to retain the amount of that demand out of the assets. The Plaintiff, without amending his bill, replied to the answer, and obtained at the hearing the common decree, directing the accounts to be taken in the usual way, and the assets to be applied in a due course of administration, in payment of the intestate's debts.

Under the common decree against an administrator, directing his intestate's assets to be applied in a due course of administration, the Master is not entitled to go into the consideration of transactions between the administrator and the other creditors which might affect the administrator's right of retainer for a debt due to himself.

Upon taking the accounts before the Master, the Defendant, in his discharge, credited himself with the amount of the sums in which the intestate had been indebted to him, and in respect of which he insisted on his right to retain out of the assets in his hands as against the Plaintiff and the other creditors in equal degree.

In opposition to this claim, the Plaintiff proved by affidavits that the Defendant had, on being pressed by the other creditors for payment of their debts, undertaken and agreed to postpone his own demand till the amount of their debts had been satisfied, thereby in effect consenting to waive his right of retainer.

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The Master disallowed the Defendant's claim, and having reported accordingly, an exception was taken to his report. The Vice-Chancellor, after argument, allowed the exception, upon the ground that, under a decree for accounts framed as this was in the common form, and directing the assets to be applied in a due course of administration, the Master had no authority to go into the consideration of extrinsic circumstances, by which the legal rights of the Defendant as administrator might be qualified or varied. The Plaintiff now appealed from his Honor's order.

Sir *W. Horne* and Mr. *Bethell*, in support of the appeal.

The debt claimed by the administrator was founded upon a contract of the intestate to pay him a certain sum of money. It cannot be pretended that, because no evidence is gone into to disprove the existence of the Defendant's debt, its validity is therefore admitted. The fact of the Defendant having, by his answer, stated himself to be a creditor, was not sufficient. He was still under the necessity of proving his claim as a debt in the usual manner in the Master's office; and if he had been an ordinary creditor, and had not also united in his person the character of administrator, he must, upon carrying in his charge, have proved it as a debt then due and payable; and it would have been competent to the parties representing the estate to take issue upon the charge. One of the incidents to a due course of administration is, the application of the right of retainer; but that right is merely a consequence flowing from the presumption of law that the administrator shall be held to have paid himself, because he is incapable of suing himself; and as in this case there was no evidence of the existence of the debt till the parties were before the Master, any circumstances affecting

affecting that debt, and the remedy for it, such as a waiver of the right of retainer, might be brought forward in evidence at the same time.

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Mr. Barber, contra.

*The LORD CHANCELLOR.**

It appears to me that the Vice-Chancellor's judgment is perfectly correct. By the decree, as I understand it, the assets are to be administered according to the ordinary course,—the course in which assets are administered in a court of equity. Here, however, the Master has upon special grounds taken upon himself to depart from that course. In order to justify such departure, there ought to have been a specific instruction to that effect. It is said there has in this case been a waiver of the right to retain, but the facts respecting that part of the case have not been gone into, and indeed, in the present state of the proceedings, they could not properly be presented to the Court, which is consequently not at liberty to assume that there was any waiver.

On the ground, therefore, that the Master had no authority under the decree to enter into the consideration of the question, I must affirm the order of his Honor allowing the exception.

* *Lord Lyndhurst.*

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March 21.
April 15.

ASTON v. HERON.

If the misconduct of an officer of the Court, in executing its orders, becomes the subject of civil proceedings before another tribunal, the Court, in its discretion, may either itself take cognizance of the complaint, or may leave the matter to be dealt with upon such proceedings; but wherever the title to redress against such officer is founded on a denial of his authority, or on an alleged defect in the order which he has executed, the Court (which alone is competent to decide upon the validity of its own orders) is bound to interpose by injunction, and assume exclusive jurisdiction over the matter of complaint.

JAMES HEATH LEIGH was, in *March* 1812, appointed, by an order of the Court, the receiver of certain estates in the county palatine of *Chester*; and he entered, about that time, on the duties of his office. *John Eachus* occupied part of the estates as tenant; and in *April* 1833, the receiver put in a distress for rent in arrear to the amount of 174*l.* 10*s.* This was levied without any specific complaint or allegation of irregularity, and to the amount of 176*l.* 15*s.* 3*d.*, an amount somewhat less than was sufficient to cover the costs and taxes; and thereupon *Eachus* commenced an action of trespass against the receiver and the bailiff who made the levy. An injunction having been obtained to restrain the proceedings in this action, a motion was now made to discharge the order of the Vice-Chancellor refusing to dissolve the injunction.

Mr. Knight and *Mr. G. Richards*, for the motion.

Mr. Pepys and *Mr. Booth*, *contra*.

The LORD CHANCELLOR.

April 1!

I am of opinion, that, in the circumstances here set forth, his Honor could not do otherwise than maintain the injunction for the protection of the receiver, and of the Court's administration.

It is necessary to distinguish this case from some others to which it bears some resemblance, but from which it is separated by essential differences.

Where

Where a proceeding is begun which questions the title of the receiver, there, undoubtedly, the Court not only will restrain the further prosecution of the action, but may, if it think fit, punish those by whom the action was brought without leave, as for a contempt. In an anonymous case (a), where an application was made for liberty to defend an ejectment brought against a receiver, Mr. *Lloyd*, *amicus curiæ*, stated the general understanding of the profession to be, that no person could bring ejectment without the permission of the Court, and that whoever did so would be committed. In fact, such a proceeding is a rescinding of the Court's appointment. This, then, is clear; but it is said not to be the present case, in which, it is alleged, the receiver's title is not disputed; and for the present I shall suppose that to be so.

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Again, where an irregularity has been committed in executing the process of the Court, if the Court has declared the execution irregular, and discharged the party from custody, nothing can be more clear than that he has been illegally detained, and that he would have a right to bring his action for the false imprisonment, unless this Court interfered to prevent such a proceeding. This point has been fully considered in several cases, particularly in *Frowd v. Lawrence* (b), and afterwards by me in *Green v. Wilkins*, in the course of the sittings after Michaelmas term 1831. Lord *Eldon*, as well as myself, felt that it was a strong jurisdiction. For what, indeed, was it but saying, — a subject has been falsely imprisoned, and yet he shall have no remedy before a jury, because the injury done was committed in executing the process of the Court of Chancery? The Court excludes all other jurisdiction in every thing relating to its process,

(a) 6 Ves. 287.

(b) 1 J. & W. 655.

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cess, not only preventing any other court from judging whether or not its orders were regular, but from examining into the regularity of their execution; and not only preventing such examination, but shutting out redress at any hands but its own, where a wrongful act is admitted to have been done under colour of obeying its commands. It assumes to be the only judge of all that regards the issuing and the execution of its own orders.

Whether or not it be necessary that the Court should enjoy this jurisdiction, and have the power of enforcing it, exclusive of all interference, even where its orders cannot be said to have been obeyed, but rather have been colourably used as a pretext for wrong-doing, it is now too late to inquire. The question has been settled long ago. The case of *Bailey v. Devereux* (a), and still more that of *May v. Hook* (b), clearly prove that in all cases of this kind the Court, on the application of those who are sued for what they have done in executing its process, may interpose to prevent or stay such proceedings; and in *Frowd v. Lawrence*, Lord Eldon, while he admitted the jurisdiction to be very strong which prevented a party falsely imprisoned from appealing to a jury, nevertheless felt that he was not at liberty to give it up.

That these cases shew the right to reside in the Court, I am quite ready to admit; but I do not think that they go further. They do not shew that the Court must, in all such instances, exercise the right. They do not limit its discretion, although they prove its authority.

Wherever

(a) 1 *Vern.* 269.; stated from the Registrar's book, in 1 *J. & W.* 660. n.

(b) 1 *Dick.* 619.; stated from the Registrar's book, in 1 *J. & W.* 663. n.

Wherever the title of its officers, whether receivers or committees, is disputed, the Court has no choice: it cannot allow any proceedings of the kind to go on without abandoning its own jurisdiction; it must restrain as of course, otherwise it permits its own orders to be rescinded, and its jurisdiction to be questioned—its orders to be rescinded indirectly, and not by the superior court of appeal; its jurisdiction to be questioned by courts of inferior or co-ordinate authority. If, for example, ejectment could be maintained against a receiver, and possession be thereby recovered, what would this be, but to enable the court and jury to discharge the order for the receiver, or, what is still more absurd, to frustrate that order by preventing its execution? But where the process has been irregularly, that is, illegally, used,—where it has been made the pretext for doing wrong, no considerations either of principle or of practical convenience can require that the Court should, in every case, draw to itself the examination of the matter, prevent all other tribunals from punishing the wrongdoer, and exclude the injured party from access to all redress, save that which its own jurisdiction can afford.

Thus, put the case of an excess committed in performing the orders issued. Suppose that the wrong party has been attached for a contempt, and hurried to prison in despite of the most satisfactory assurances, and even proofs furnished on the spot, that the officer was mistaken; or suppose him carried to a wrong prison, to a prison out of the jurisdiction, and contrary to the provisions of the *habeas corpus* act; surely it would be preposterous to contend that this Court alone could punish or redress wrongs like these—preposterous to apprehend any peril to its jurisdiction—puerile to imagine that its dignity would sustain any diminution if the wrongdoer were left to answer for his offence before a jury of

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his countrymen, and that convenient tribunal were allowed to award the compensation which the sufferer should receive. It is fit, and even necessary, that in all such cases the Court should possess the power of itself interposing and drawing exclusively within its own precincts the functions both of penal and of remedial judicature. The Court should have authority, alone if it sees occasion, to perform the office of punishing the wrong-doer and giving redress to the injured ; but that it well and safely may share this jurisdiction with the legal tribunals of the country, that it well and safely may delegate to them the task of such visitation, I hold to be alike clear upon the reason of the thing, and consistent with all the analogies in which the general doctrine of contempt abounds.

Take the case, for example, of other courts of high jurisdiction. If the process of the King's Bench has been abused, false imprisonment will lie before the Common Pleas or Exchequer, although neither of these Courts could directly examine an order made by the King's Bench ; nor will the latter Court stop, indeed it has no power to stop, an action thus brought, upon the ground that the irregularity was in executing its process—that no other Court can judge of what is or is not a breach of its rules, and that it alone can give redress for the injuries committed in its name. The High Court of Parliament, endowed with loftier functions, lays claim to more ample privileges ; the rather, because these have never been with absolute precision ascertained. Where, therefore, any thing has been done in execution of their orders, the Commons have been frequently in the habit of refusing to allow the matter to come in question before any other tribunal. But they have never held it to be obligatory upon them in all cases to be the sole judges of the due execution of their own process. Nor have they
 deemed

deemed it any abandonment of their rights, or degradation of their state, to permit the conduct of persons executing their orders, nay, to allow the extent of their privileges themselves to become incidentally the subject of examination in courts of subordinate jurisdiction. The same assembly which, in the reign of Queen *Anna*, committed to prison the counsel who argued a writ of error on a record touching a right of contested election, and which half a century later went to the preposterous extremity (I speak it with all reverence) of trying, or rather violently asserting, a right of fishing claimed by a member, through the medium of committing those who disputed it to the custody of the *serjeant-at-arms*, will not easily be suspected of too little tenacity in holding by its privileges, or too scrupulous a reluctance in sustaining its dignity; and yet that same body allowed all the Courts of *Westminster Hall* to question its right of commitment a few years ago, and I myself, albeit then a member, was suffered, and with impunity, to argue against that right before the other house of Parliament, and to treat the power assumed by the Commons as an illegal usurpation. Enough assuredly has been said to prove that the Court of *Chancery*, though clothed with the undoubted right of preventing any other tribunal from examining questions arising out of the execution of its orders, is not bound upon any principle to exclude such concurrent jurisdiction in every case, whatever be the circumstances that may have attended it.

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The two descriptions of cases to which I have adverted — those where the jurisdiction of the Court is disputed directly by resistance, or indirectly by obstruction, and those where complaint is only made of the irregular or oppressive, and therefore illegal execution of its unquestioned decrees — do neither of them accurately embrace the facts of the present case, although

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they furnish a principle which exhausts the whole subject, and which therefore rules the present case, as well as all others. That principle is, that, in the first class of cases, those where the jurisdiction is disputed, the Court has no choice, but must, at all events and at once, draw the whole matter over to its own cognisance; but that in the other class, where, admitting the Court's authority, redress is only sought for irregularity or excess in the performance of its orders, and, generally speaking, wherever the jurisdiction is not denied or resisted, the Court has an indisputable right to assume the exclusive jurisdiction, but may, if it think fit, on the circumstances being specially brought before it, permit other courts to proceed for punishment or redress.

The present case comes clearly within the latter description; for although it is not a case where an illegal or oppressive execution is complained of, it is one where a person admitting the jurisdiction asserts a claim of right which interferes with the rights sought to be exercised by the receiver, as standing in the shoes of the party of whose estate the Court has taken possession. The possession of the receiver is the possession of the Court, and no one can disturb it but through an application to the Court. The acts of the receiver, in the administration of the estate, are the acts of the Court; and the Court may, therefore, if it pleases, prevent any other jurisdiction from questioning those acts, because, strictly speaking, that would be to question the Court's administrative proceedings. Nevertheless, the Court is fully authorised, on a case being made, to leave the acts of its receiver to be questioned elsewhere, for the purpose of trying a right in those for whom it holds possession, just as it is fully authorised to leave a complaint of irregular or oppressive execution of its orders to be adjudicated elsewhere, if that, upon the facts

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disclosed, should appear to be the preferable course. In the one instance, the Court exercises its discretion by abstaining from taking cognisance of a wrong committed in its name; in the other, it abstains from taking cognisance of a disputed right. In both cases it may, if it think fit, assert and assume exclusive jurisdiction of the matter; but in neither is it bound to exclude the other tribunals, as it would be where its jurisdiction was disputed, or its authority, in any other way, contemned.

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HERON.

Acting upon these principles, if the facts of the present case had disclosed any irregularity in the performance of the receiver's duty, or raised any distinct question of contested right, proper for the cognisance of the common law courts, I should without hesitation have permitted the action of trespass to proceed, had it appeared more convenient that the redress should be sought, or the controversy determined, on the other side of the Hall; but I find nothing whatever in the affidavits except a vague and general allegation, that the distress put in by the receiver for rent not denied to be in arrear was irregularly and illegally levied. There is no suggestion that this rent arrear is over-stated, none that an excessive distress was taken — not even a complaint, upon oath, that an over-charge for expences is made—only a hint dropped to this effect in the correspondence. The party, then, can have no right whatever to complain, if, having failed even to state a case against the officers of the Court, and in circumstances sworn to on the other side, and not denied, which render his proceedings at law more than suspicious, he should be unable to obtain leave to prosecute his action. If he has such facts to state as will incline the Court either to withdraw the injunction and let him proceed, or to afford him redress by the intervention of its own officers, and in the exercise of its own un-

questioned

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questioned authority, he may come again with a mended hand. In the mean time, his present motion must be refused with costs.

May 8.
June 5.

THOMAS v. The EARL of JERSEY.

Service of a subpoena to appear, and of an order for a sequestration nisi, upon a peer, at a time when he was beyond the jurisdiction, by leaving them at the peer's town residence, held, under the circumstances, to be good service.

ON the 7th of *January* 1834, the Plaintiff filed his bill against the Earl of *Jersey*, and on the 16th a letter missive, with a copy of the bill, was served on the Defendant by being left with one of the Defendant's female servants at his town residence in *Berkeley Square*. His Lordship was then abroad, having left *England* for the Continent in the *November* preceding. On the 3d of *February*, a subpoena to appear was served in the same way. On the 20th of *February* an order nisi for a sequestration issued, and, on the 28th, inquiry was made of his Lordship's servants at his house in *Berkeley Square* with respect to his place of residence, when it appeared that he was still on the Continent. On the 6th of *March* the Vice-Chancellor, on affidavit of these facts, directed that service of the order for a sequestration nisi at the Defendant's town house should be deemed good service; and on the 15th of *April* a motion for discharging the previous orders was refused by his Honor with costs. Two days afterwards an appearance was entered for the Earl of *Jersey*.

The Solicitor-General and Mr. *Tennant*, on behalf of the Defendant Lord *Jersey*, now moved that the three several orders of the Vice-Chancellor, of the 20th of *February*, the 6th of *March*, and the 15th of *April*, might be discharged.

For

For the motion, it was argued that the Plaintiff had in this case proceeded just as if Lord *Jersey* had been residing within the jurisdiction; although it was perfectly settled, that where a party is *bonâ fide* resident beyond the realm, service by leaving the writ at his ordinary dwelling-house in this country, was not good service. If the Defendant was non-resident, such dwelling-house was not his usual place of abode. There was not even an allegation or pretence that Lord *Jersey* went abroad to avoid service.

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Mr. *Rolfe* and Mr. *Stinton*, *contra*, submitted, that in determining whether a party was to be considered as abroad or not, the Court would look into the circumstances of the case. Here the service was altogether regular; the question had been much discussed and considered in the court below, and precedents were directed to be searched for before the orders were made. The order for the sequestration was not absolute, but *nisi* only; and according to the authorities such sequestration did not bring the party into contempt. It was part of the order that it should not be made absolute except upon personal service; *Smallbrooke v. Lord Donegal* (a). The Defendant had therefore nothing to complain of with respect to the sequestration of his goods and chattels; and in fact the order was no more than a form operating as a notice to the Defendant, that if he did not enter an appearance, the sequestration would be made absolute: *Lord Clifford's case*. (b) In *The Attorney-General v. Earl of Stamford* (c) an order for a sequestration *nisi*, served at the town residence of a peer, was decided to be properly served, although the peer usually resided, and was then residing, at his country seat; and in *Smallbrooke v. Lord Donegal*, service of the order *nisi* on

(a) 3 *Anst.* 647.

(b) 2 *P. Wms.* 385.

(c) 2 *Dick.* 744.

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on the clerk in Court was held sufficient, the absolute order alone requiring personal service. It was never said or pretended that the Defendant did not intend to return; the fact being that he left *England* in *November* 1833, and came home in *April* last. If then his house in *Berkeley Square* was to be deemed his usual place of residence, every thing was regular; for it was admitted that service at the usual place of residence was good service. The Defendant, by having since entered an appearance, had waived any objection, for it was settled that a subsequent appearance cured every irregularity *Anon. (a), Bound v. Wells. (b)*

The Solicitor-General, in reply, observed that in the *Attorney-General v. Earl of Stamford* the Defendant was not resident abroad, but in this country, and that the case in the Exchequer could be no authority upon a question as to the practice of this Court. No case had been or could be produced in which service at a party's dwelling-house had been held good, where the owner was *bonâ fide* residing out of the jurisdiction. The act of parliament (c), which, in particular cases, where parties were abroad, gave effect to certain proceedings in lieu of personal service, would have been perfectly superfluous if such a practice as this were allowable; for a party who absconded was put by that statute in a more favourable situation than one who went abroad for his health or amusement would be placed in, if the Vice-Chancellor's orders were to be upheld. As then there was no sufficient service of the first order, that order failed, and of course the others, which were founded upon it, failed also.

June 5.

The LORD CHANCELLOR refused the motion.

(a) 3 Atk. 567.

(b) 3 Mad. 434.

(c) 5 G. 2. c. 25.; but see 4 &

5 W. 4. c. 82.

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Lord ALDBOROUGH v. BURTON.

ROLLS.
July 26.

THE petition was presented by the Plaintiff, Lord *Aldborough*, who was residing at *Carlsbad* in *Bohemia*; and it prayed for the discharge of an order obtained by the Defendant, requiring the Plaintiff to give security to answer the costs of the suit. The ground upon which the discharge of the order was sought was, that Lord *Aldborough* was a peer of *Ireland*, and exempted, by reason of his privilege, from the ordinary rule, which rendered plaintiffs residing out of the jurisdiction liable to give security for costs.

A Plaintiff who is a peer, and out of the jurisdiction, must give the usual security for costs.

Mr. *Bickersteth*, who supported the petition, said he had not been able to find any case in which an order to give security for costs had been discharged upon the ground of the privilege claimed by the Plaintiff. He understood, however, that a case* had lately occurred in the Court of Exchequer, before Lord *Lyndhurst* and the other Barons, in which the Court had refused to grant an application, the object of which was to subject Lord *Ferrers*, who was residing abroad, to give security for costs. The general rule, no doubt, was, that where the plaintiff was resident out of the jurisdiction, the defendant was entitled to an order on the plaintiff to give security for costs: *Meliorucchy v. Meliorucchy* (a),
Gage

* The case alluded to was *The Earl of Ferrers v. Robins*, where it was ruled, that security for costs cannot be required from a peer, though residing abroad: 2 *Dowl. Pr. C.* 656.

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Gage v. Lady Stafford (a). There were also cases in which plaintiffs entitled to privileges, such as ambassadors' servants, had been required, even after answer, to give security for costs: *Barret v. Buck* (b), *Goodwin v. Archer* (c), *Anon.* (d). On the other hand, there were cases in which persons residing abroad were exempted from the liability to give security for costs; as where the plaintiffs were naval or military officers, or persons otherwise actually employed on foreign service. The Plaintiff did not, undoubtedly, come under the description of a person actually employed on foreign service; but he was a peer, entitled to all the privileges of an *English* peer, except that of sitting in Parliament. If, therefore, an *English* peer were exempted from the liability to give security for costs, the Plaintiff was equally entitled to that privilege; and the order obtained by the Defendant ought to be discharged.

Mr. Pemberton, contra.

There is no authority on the point, for this obvious reason,—that it is now, for the first time, attempted to introduce an exception to the general rule. Lord *Eldon* has said, that the rule laid down as to security for costs to be given by plaintiffs abroad was to be considered as a general rule, applying to rich and poor: *Ogilvie v. Kearne* (e). Where a peer, or any other person, is residing abroad upon the public service, he cannot be called upon to give security for costs; but if a peer chooses to reside abroad for his own pleasure, he is entitled to no higher privilege, in this respect, than any other plaintiff. Ambassadors' servants, and other persons having privilege, have been compelled, upon insti-

(a) 2 *Ves. sen.* 557.

(d) *Moss.* 175.

(b) 1 *Eq. Ca. Abr.* 550. pl. 4.

(e) 11 *Ves.* 600.

(c) 2 *P. Wms.* 452.

instituting suits in this Court, to give security for costs, because their privilege might otherwise leave the defendant remediless; but if such persons, or if a peer, whose person is also exempted from arrest, go abroad, is their liability to give security to be diminished because, by removing out of the jurisdiction of the Court, they have increased the insecurity of the defendant? There is no instance in which an exception has been made in favour of persons having privilege, who choose to go abroad; and it would be unjust to relax the rule of the Court, which Lord *Eldon* had declared to be alike applicable to rich and poor, in such cases.

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The MASTER of the ROLLS.

Security for costs is to be given where the plaintiff is out of the jurisdiction of the Court, because the costs, in such case, cannot be recovered by the process of the Court. It is true that the Plaintiff is exempted, by virtue of his privilege, from arrest; but, if he were within the jurisdiction, the costs could be recovered by other process. Where a party is out of the jurisdiction on public service, it is not reasonable that he should be subjected to the burthen of security for costs. The petition must be dismissed, but without costs, as the application is novel, and the point raised by it not altogether free from obscurity.

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1835.
Feb. 16.

LILLIE v. LILLIE.

Where it appears upon the bill that the plaintiff is an officer in his Majesty's service, and out of the jurisdiction, the defendant will be entitled to the usual security for costs, unless it be distinctly stated that the plaintiff is on actual service. It is not sufficient to state that the plaintiff is an officer of a particular regiment, and residing at a particular place out of the jurisdiction, although the regiment may, in fact, be stationed at that place.

MR. *M'DOUGALL* moved for the discharge of an order obtained by the Defendant requiring the Plaintiff to give security for costs, on the ground that the Plaintiff was an officer in His Majesty's service, residing at *Ceylon*, where his regiment was stationed, and that that fact sufficiently appeared upon the bill. The motion was supported by an affidavit, stating that the Plaintiff was on duty with his regiment, which was stationed at *Ceylon*.

Mr. *G. Richards* opposed the motion, on the ground that the Defendant had no notice, for any thing that appeared upon the bill, that the Plaintiff was actually employed on foreign service. The bill stated that the Plaintiff was "a lieutenant in his Majesty's fifty-eighth regiment, residing at *Ceylon* in the *East Indies*." There was no allegation that the fifty-eighth regiment was stationed at *Ceylon*; that regiment might have been stationed in the *West Indies* while the Plaintiff was residing at *Ceylon* in the *East Indies* for his own business or pleasure. Unless the word "residing" could be applied to the regiment, and not to the man, there was nothing upon the statement to connect the Plaintiff's residence at *Ceylon* with his duties as an officer in his Majesty's service, or to give the Defendant any sufficient notice that the Plaintiff was employed abroad in the public service.

The

*The MASTER of the ROLLS.**

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v.
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The Court has no judicial knowledge of the place at which a particular regiment in his Majesty's service is stationed; nor was the Defendant bound to infer from the statement in the bill that the Plaintiff's regiment was stationed at the place where the Plaintiff was alleged to be residing. Where it appears upon the bill that a Plaintiff is out of the jurisdiction, the Defendant is entitled of course to security for costs, unless circumstances are distinctly stated, which shew that the Plaintiff is exempted from the liability to give security. In this bill no such circumstances are distinctly stated, and the motion must, therefore, be refused with costs.

* Sir C. Pepys.

1834.

ROLLS.
Jan. 14.

WARING v. COVENTRY.

The estate of a tenant for life was charged with a sum of 25,000*l.* and interest from the time that the life estate commenced, and it was provided that the 25,000*l.* should not be raised until the expiration of two years from the commencement of the life estate. The tenant for life failed to keep down the interest of the 25,000*l.*, and there was raised on the estate by the trustees of the term created for the purpose of the charge, a sum considerably exceeding the 25,000*l.* The persons entitled in remainder after the life estate, have an equity to recoup out of the future income

which shall accrue to the tenant for life, the excess raised beyond the 25,000*l.*, and the tenant for life having taken the benefit of the Insolvent Debtors' Act, his assignees are affected by the same equity.

BY a settlement of the estates in question in this cause, the Defendant, *John Thurlow Scott Waring*, was, after the death of his father *John Scott Waring*, tenant for life, with remainder to his children, subject to a term, thereby created, of 1000 years, limited to trustees upon trust, "by sale, mortgage, demise, or other disposition of the premises therein comprised, or a competent part thereof, for all or any period of the same term, as soon as might be after the expiration of two years from the day of the decease of the said *John Scott Waring*, to levy and raise the sum of 25,000*l.*, with interest thereon at 5 per cent. per annum, from the day of the decease of the said *John Scott Waring*," for certain purposes in the said settlement stated. The trustees, at different times after the expiration of two years from the death of *John Scott Waring*, did, in fact, raise, by sale or mortgage, a sum considerably exceeding 25,000*l.*, in consequence of the Defendant *John Thurlow Scott Waring* not having regularly paid out of the rents and profits of the estates the interest of the 25,000*l.* Prior to the institution of the suit, the Defendant *John Thurlow Scott Waring* took the benefit of the Insolvent Debtors' Act; and the assignees under the insolvency were also made parties defendants to the suit. The bill was filed by the children of the Defendant *John Thurlow Scott Waring*, who were entitled in remainder after his death, for the purpose of obtaining

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satisfaction out of his life estate, for the excess of the sum raised by sale or mortgage beyond the 25,000*l*.

1834.

 WARING
 &
 COVENTRY.

Mr. *Jacob*, for the assignees of the insolvent's estate, contended, that the excess raised beyond the 25,000*l*, in consequence of the neglect of the tenant for life to keep down the interest, constituted a personal debt against *John Thurlow Scott Waring*, proveable under his insolvency, and not a lien upon his life-estate. That debt, however, was subject to a deduction of interest upon the 25,000*l*, for the two years succeeding the death of *John Scott Waring*, during which time the tenant for life was, by the express provisions of the settlement, entitled to the whole rents and profits of the settled estates.

Mr. *Bickersteth*, *contra*, contended, that the sum raised beyond the 25,000*l*. constituted a lien upon the life-interest of the insolvent. The argument on the other side, was, in reality, founded on the assumption that the tenant for life was entitled, as against the remaindermen, to receive the rents and profits of the estates during the rest of his life, though he had defrauded the persons entitled in remainder of so much of the rents and profits as was equal to the excess raised by the trustees beyond the 25,000*l*. That was a proposition which could not be maintained: and if that proposition were untenable, it followed that the insolvent's estate could not be augmented in prejudice of the remaindermen; for the assignees could not stand in a better situation than the insolvent himself. As to the postponement of the time at which the charge was to be raised, that, clearly, could not affect the liability of the tenant for life, to keep down the whole interest from the time of the testator's death.

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The MASTER of the ROLLS.

The life-interest of the Defendant *John Thurlow Scott Waring*, was subject to the payment of the 25,000*l.*, and interest from the death of his father. As tenant for life, he was bound to keep down the interest; and having taken from the estate more than he was entitled to, what may hereafter accrue to him, in respect of his life estate, must go to reimburse the estate for the excess of his receipts, and does not form a mere personal demand against him. His assignees stand in the same situation as the Defendant himself, and can claim only what he could equitably claim.

It appears to me that it makes no difference that the principal was not to be raised until two years after the death of the father. The 25,000*l.* bore interest from that death; and, as tenant for life, the son was bound to keep down the whole interest.

1834.

KELSALL v. KELSALL.

Feb. 25.
March 4.

THIS was a creditor's suit, which sought to obtain payment of the debts of the testator *Isaac Kelsall*, deceased, out of the proceeds of his real estate, his personal estate having proved insufficient for that purpose. The Defendants were *Mary Kelsall* the personal representative of the testator, and *John Kelsall* an infant, who was the testator's grandson, devisee, and heir at law. The infant Defendant put in the common answer by his guardian: the cause was afterwards heard, and a decree made, referring it, among other things, to the Master to take an account of the Plaintiff's debt. The Master made a special report with respect to the debt, to which the Plaintiff filed exceptions, and those exceptions having been on argument allowed, the Defendant, *Mary Kelsall*, brought an appeal both against the original decree, and the order allowing the exceptions. The other Defendant, *John Kelsall*, having in the mean while, and subsequently to the last-mentioned order, attained his full age, a motion was now made on his behalf, that he might be at liberty to put in a new and further answer to the Plaintiff's bill, and might be allowed six weeks' time for that purpose; and that such answer, and any evidence which might be gone into in support thereof might be set down and might come on to be heard with the appeal, and that, in the meantime, the appeal might stand adjourned.

Where a decree has been made against an infant Defendant, who put in the common answer by his guardian, the general rule is, that such Defendant on coming of age has the privilege of putting in a new answer stating a different case, and of going into evidence in support of that case. The privilege does not extend to foreclosure suits.

Mr. Knight, and Mr. Rolfe, in support of the motion.

The Attorney-General, and Mr Temple, *contra*.

1834.
KELSALL
v.
KELSALL.

The various grounds on which the application was supported and opposed, as well as the authorities referred to in the course of the argument, are fully stated in the Lord Chancellor's judgment.

March 4.

The LORD CHANCELLOR.

The question raised upon this motion is, whether an infant Defendant has a right, on attaining his majority, to make a new case by answer and evidence, after publication has passed, and a decree has been made in the cause. This is a question of some importance, and certainly of rare occurrence; although (and it is one of the obvious remarks that arise upon it), if the right be as the motion assumes, it is difficult to understand how the right should not be much more frequently exercised, seeing that the circumstances in which it would be competent to do so are of every day's occurrence. I may also observe, that I know it to be the opinion of some eminent practitioners, that the right does not exist, and that they have been in the habit of advising parties appearing for infants, to proceed as if no such privilege existed. It may further be safely said, that if it does exist, no privilege can be more fit to be taken away; for it is at once hurtful to others, and in the majority of cases would prove, if resorted to, injurious to the infants themselves.

The first objection which struck me on the argument, and to which I could get no answer, was founded upon the extraordinary departure from all the principles of the Court respecting evidence which the exercise of this privilege implies; for the application assumes that, after an answer has been put in and issue joined, and evidence has been examined and publication passed,
and

and a decree *nisi* made, a new answer is to be allowed raising a new case, and followed by the examination of witnesses, and adding other proofs with the full knowledge of all that the other witnesses on both sides have sworn. The infant, who may have been twenty years and eleven months old when his former case was made, may thus avail himself of all his knowledge of his adversary's case, keeping back as much of his own as he chooses, while his adversary could not protect himself by any such reserve; because, had he left his case short, in expectation of a new one being made, the infant would have made none, and so defeated him. A door, too, would thus be opened to collusion between Defendants, against which no Plaintiff could secure himself. Various other objections suggest themselves the moment the proposition is stated, but it is needless to dwell upon them now.

1834.
KELSALL
v.
KELSALL.

On the other side, observe to what narrow limits the right of shewing cause against a decree is reduced, if some such latitude be not given as that which the motion contends for. A decree against an infant is erroneous, if it has not the clause, "unless cause be shewn within six months." Now this either means nothing, or it is intended to secure the infant against any proceeding taken to his prejudice, at a time when the law supposes him to be absent, or at least not present in such a manner as to be capable of sufficiently defending his rights: and the permission is of no avail to his protection, if he be only allowed to shew for cause, error on the face of the decree or record. He may truly say, that to the record he can object nothing; that there is equity in the bill, and he cannot demur; that the evidence supports the issues raised upon the pleadings, and that the decree is according to the equities stated in the bill, and proved by the evidence.

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 v.
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Nevertheless, he may have a case paramount the whole. He may have matter of fact to aver by way of plea, which will put a short end to the whole suit; or he may have a case to disclose by answer, and to support by proof, which will entitle him to a decree in his favour. It is plain that, unless an infant Defendant enjoys the privilege in the full and unrestricted manner which the motion claims, he cannot defend himself with effect, or be enabled to regain whatever ground he may have lost by reason of his temporary incapacity. Not to mention the fact, that if he is allowed to impeach the decree only for error, except in the stay of execution and the matter of costs, he enjoys but little advantage over an adult Defendant, who may have an appeal or rehearing upon the same grounds.

Upon such reasons, probably, the decisions have proceeded, which render it now too late to question this privilege, however inconvenient to the administration of justice its exercise may prove. In truth, the privilege exists even to a larger extent than is claimed by the present application. Infants have been allowed after answering once and before attaining majority, to answer a second time: and there seems no limit to this right upon special circumstances alleged, independently of their right to answer when they come of age, without shewing any special circumstances at all. Nor is there any established exception to this rule, unless it be in foreclosure suits; for the attempt, ingeniously made upon the argument in this case, to extend that exception to creditors' suits, on the ground of their similarity, fails entirely when the precedents come to be examined. This is obvious from the case of *Fountain v. Caine* (a), which was a creditor's suit exactly like the present.

Sir

(a) 1 P. W. 504.

Sir *Joseph Jekyll*, after having been furnished with a precedent in the time of his predecessor (Sir *John Trevor*) said, he understood the privilege to be of course; and he gave as a reason, that if the infant were not permitted to answer anew, it would be allowing him to shew cause, and at the same time tying up his hands from doing so. So Lord *King*, assisted by the Master of the Rolls, in *Napier v. Lady Effingham* (a), gave the infant Defendant leave to put in a new answer; his Honor observing, that it was of course and of right, and that he believed he had granted it upon a petition *ex parte*. The reporter adds, in a note, that the consequence is, the infant may examine witnesses anew, to prove a different defence from the one made before. This case was appealed to the House of Lords, and the judgment affirmed. (b)

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v.
KELBALL.

Bennet v. Lee (c) is a case that underwent great discussion, and upon which Lord *Hardwicke* delivered one of his most elaborate judgments, though I can find no trace of it in his note books. The decree, however, is in the registrar's book; and it is according to the report in *Atkyns*, and nearly in the words cited by the editor in his note. An application had been made in an earlier stage of that cause for leave to answer again, before the infant came of age; and Lord *Hardwicke* seeing the endless inconvenience of such a licence paused and desired the matter to stand over. But he afterwards upon full consideration granted the permission, holding it to be clear that after infants come of age they have a right to put in a new answer and make a better defence if they can; and also that even before they come of age they may have leave to do so, upon special circumstances,

(a) 2 P. W. 401.

(c) 2 Atk. 529.

(b) 4 Bro. P. C. 340. Toml. ed.

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 KELSALL
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 KELSALL.

circumstances, as that by delaying till majority they might not be able to make good their case.

That case of *Bennet v. Lee* was made the ground of the decision in *Savage v. Carroll (a)*, in which I must observe that the doctrine was carried two steps further than the authorities in strictness warrant; first, the infant was allowed, without putting in a new answer, to adduce new evidence which had come into his power subsequently to the decree; and, secondly, he was allowed to do so without making out a special case for it, and he being still an infant. Now in *Bennett v. Lee*, Lord *Hardwicke* expressly says that is not of course, but only on circumstances specially shewn; and no cases are to be found in which leave has been given to examine new witnesses to the former case made. The leave given is to put in a new answer and support the issues raised in that answer and subject of course (though this may not be stated) to the Plaintiff's right to except and also to amend his bill; and it does not seem to be at all an unreasonable restriction of the privilege that the infant should be precluded from bettering his proof of a case formerly made, for, if he was of capacity of himself or by his guardians to make a case, he might also have proved it; nor is there any good ground for letting him mend his evidence, at least until he has fully satisfied the Court that he had been prevented by incapacity or other circumstances from adducing the additional evidence at an earlier period.

That an infant may be foreclosed, and cannot, in shewing cause, travel into the account, but only shew error in the decree, has been laid down by many of the Judges in this Court—by Lord *Talbot*, Lord *Hardwicke*,
 Lord

Lord *Alvanley*, and Lord *Eldon*: *Mallack v. Galton* (a), *Bishop of Winchester v. Beavor* (b), and *Williamson v. Gordon* (c). But there is not a vestige of authority for extending this (which is an exception to the rule) to the case of creditors' suits; and *Fountain v. Caine*, the leading case upon the subject, is directly the other way.

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v.
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The late statute (d) does not alter the law in this particular. The tenth section merely provides, that in all actions, suits, and other proceedings where theretofore the parol might demur, the parol shall not demur in future, but such proceedings shall be carried on in like manner as suits and actions might have been in cases where the parol did not demur. Now, the privilege under discussion is not that of having the parol demur, whereby further prosecution of the suit is stayed, but of letting in the infant after the suit has been prosecuted and a decree obtained. Besides, the tenth section of the act is prospective; and this decree was made in *February* 1830, some months before the passing of the act. The eleventh section, enabling the Court to compel conveyances by infants, if it affected the present question, though applicable to suits already commenced, is also prospective as to the decree. The fact that parol demurrer has been abolished by act of parliament may possibly be deemed a reason why courts of equity should hereafter take away, or, at least, restrict the privilege which they have hitherto allowed to infants, upon a kind of analogy to the advantage given them at law. I say a kind of analogy; for, here, the law has not been followed merely, but outstript, and the indulgence has been in a different direction. The privilege is much larger in respect of the kind of suits; and it does not

stay

(a) 3 P. W. 352.

(b) 3 Ves. 314.

(c) 19 Ves. 114.

(d) 1 W. 4. c. 47. s. 10.

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stay the proceedings, but only prevents execution till an opportunity of shewing cause.

Upon the whole, there can be no doubt that the infant is entitled of right, when he comes of age, to answer anew and make a better defence, and to support that defence by evidence. I have thrown out what seem to me to be the limits of the privilege where it is to be exercised by a defendant, either while his infancy continues, or after he attains majority. But it is unnecessary to determine these limits at present. What has now been stated is sufficient to support the order I shall make for granting the application, as far as relates to the leave to answer and examine witnesses, and the time sought for that purpose. It seems impossible, however, that the rest of the application—that part of it which seeks to set down the cause on the new answer and fresh evidence, to be heard with the appeal—should be granted without further consideration and discussion. At the very least, the Plaintiff must have liberty to cross-examine the new witnesses; and I hold it to be quite clear that he must also have leave to except, and, in short, to proceed, in all respects as if the suit, with the exception of the bill, were commenced anew. The answer already made, and depositions already taken may stand; but the parties must proceed on the new answer, exactly as if it had been the first.

This much is clear. The precedents make no mention of such particulars; but precedents must be read with understanding, and with a regard to the subject matter, and so as to give them a simple interpretation. I would gladly go further to help the Plaintiff; and if I could have found any thing like a precedent for letting him in to examine witnesses in reply, after seeing the depositions, I should have acted
upon

upon it, and applied it to the purposes of substantial justice, the Defendant having now had the benefit of knowing the Plaintiff's case. At present, I can only make the order to the extent I have stated; and if any trace of a precedent can be found in the meantime, I shall be ready, after the Defendant's witnesses have been examined, to receive, on behalf of the Plaintiff, any application having for its object to lessen or obviate the injustice which may arise from permitting a party to mend his own case after he has seen his adversary's.

1834.
KELSALE
v.
KELSALE.

PAIN v. SMITH.

ROLLS.
1833.
Nov. 25.

THE Plaintiff filed his bill for the purpose of giving effect to an equitable security made by the deposit of deeds; and the bill prayed a sale of the estate, the title-deeds of which had been deposited.

Where an equitable security is given by the deposit of deeds, the Plaintiff, on a bill brought to give effect to his security, is entitled to a decree for a sale.

Mr. *Bickersteth*, at the hearing, resisted, on the part of the Defendant, the sale of the property prayed by the Plaintiff, and argued, that all the Plaintiff could claim was a legal mortgage. If, where deeds were deposited, and the equitable mortgagee brought his bill to obtain the benefit of his security, the Court could decree an immediate sale, an equitable mortgagee would be in a better situation than a legal mortgagee.

Mr. *Pemberton*, for the Plaintiff, contended, that from the earliest period at which equitable mortgages were recognised, the course of the Court had been to decree a sale. In *Russel v. Russel* (a), which established the doctrine

(a) 1 Bro. C. C. 269.

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doctrine of equitable mortgages, Lord *Thurlow* decreed that the deposited lease should be sold, and the plaintiff paid his money. Where there was no agreement for a legal mortgage, and the only evidence of contract between the parties was the deposit of deeds in the hands of the lender of the money, the obvious inference was, that the deposit was made, not as a pledge for a formal security, but as a pledge for the payment of the money.

The MASTER of the ROLLS.

If the contract between the Plaintiff and the Defendant had been, that the deeds should be deposited as a security until a legal mortgage could be prepared, there would be ground for the argument of the Defendant; but there being here a general equitable charge upon the property, the Plaintiff is entitled to a sale for satisfaction of that charge, and such has been the constant course of the Court; and the decree must be accordingly.

1834.

PARKER v. HOUSEFIELD.

Rolls.
Nov. 21.
Dec. 8.

THE bill had been filed to obtain the benefit of an equitable mortgage by the deposit of title-deeds in the hands of the Plaintiff, and the decree, as drawn up by the registrar, directed payment by the Defendant of the sum which should be found due to the Plaintiff for principal and interest, within six months after the Master should have made his report. The decree went on to direct a reconveyance of the mortgaged premises by the Plaintiff, upon such payment by the Defendant as aforesaid, and a foreclosure in default of payment.

In the decree upon a bill by an equitable mortgagee, the equitable mortgagor will be allowed six months to redeem the deposited deeds.

Mr. *Pemberton* insisted that the Plaintiff was entitled to an immediate sale of the estate, the title-deeds of which had been deposited, and he referred to *Pain v. Smith* (a). The registrar had treated the equitable mortgage as if it had been a legal mortgage, directing a reconveyance upon payment of the mortgage-money and interest where there had been no conveyance, and there was, consequently, nothing to re-convey; and further directing a foreclosure in default of payment, when the remedy to which the Plaintiff was entitled was a sale. The period of six months allowed for payment in the case of a legal mortgage, was as inapplicable to an equitable mortgage, as the other directions respecting a reconveyance and foreclosure.

Mr. *Girdlestone jun.*, *contra*, contended that the Defendant was entitled to be allowed six months to redeem the

(a) *Suprà*, p. 417.

1834.
 {
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the deposited deeds, and he relied upon the form of the decree in *Smith v. Nelson* (a) which was a bill by an equitable mortgagee, where the Defendant was ordered to pay within six months, and afterwards, upon default, there was a further order for a sale.

Mr. *Pemberton*, in reply.

Dec. 8.

*The MASTER of the ROLLS.**

The question was, whether, in the case of an equitable mortgage by a deposit of title-deeds, the decree ought to give to the mortgagor six months to redeem, as in cases of legal mortgages. To determine this, it is material, in the first place, to consider in what light courts of equity view such equitable mortgages; and it appears that a deposit of title-deeds has always been considered as an imperfect mortgage, which the mortgagee is entitled to have perfected, or rather as a contract for a mortgage, which, according to the well-known doctrine of courts of equity, would give to the party claiming the benefit of such contract all such rights as he would be entitled to if the contract had been completed. Accordingly, in the very commencement of the doctrine of equitable mortgages, viz., in the cases of *Featherstone v. Fenwick*, in the year 1784, and *Harford v. Carpenter* in the year 1785, both cited in *Russel v. Russel* (b), we find Lord *Thurlow* saying, that a deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated. In *Birch v. Ellam*,

* Sir *C. Pepys*.

(a) *Seton's Forms of Decrees*, p. 180.

(b) 1 *Bro. C. C.* 269.

Ellames (a), the Chief Baron of the Exchequer says, "A deposit of title-deeds as security for a debt, is now settled to be evidence of an agreement to make a mortgage, and such agreement is to be carried into execution by the Court." The decree in that case was, that the defendant should pay, or stand foreclosed and convey. In *Ex parte Wright* (b), Lord *Eldon* says, that a deposit of title-deeds was evidence of an agreement for a mortgage, and that an equitable title to a mortgage was, in equity, as good as a legal mortgage. Such being the light in which courts of equity view equitable mortgages by deposit of title-deeds, it would seem to follow that the remedy to be afforded to such mortgagees should, as nearly as possible, correspond with that to which legal mortgagees are entitled; and, accordingly, from the search which I have directed to be made as to the form of decrees upon such subjects, I find that such has been the principle adopted. In *Newton v. Aldous* (c), the decree, which appears to have been penned by Lord *Eldon* himself, was as follows:—
 "Declare that the title-deeds relating to the estate in question, having been deposited by the said *John Aldous*, the bankrupt, in the hands of the plaintiff, the plaintiff is entitled to be considered, in this Court, as if he was a mortgagee of the premises therein comprised, and decree the same accordingly, and refer it to the Master to take an account of what is due for principal money advanced on the said deposit, and for interest thereon, and to tax his costs of this suit. And declare that such principal, interest, and costs, are to be considered as a charge upon the said premises. And upon the defendant, *William Tolley*, paying unto the plaintiff, within six months after the Master shall have made his report at,

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 v.
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&c.,

(a) 2 *Anst.* 428.

(c) 18th of *July* 1804.

(b) 19 *Ves.* 255.

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 {
 PARKER
 v.
 HOUSEFIELD.

&c., let the plaintiff deliver up all deeds, &c. But declare that in default, &c. plaintiff will be entitled to the said premises, free and clear of all right, title, interest, and equity of redemption of, as, and to the same, and to have an absolute reconveyance thereof accordingly. And in that case, let the defendant execute such conveyance thereof to the plaintiff, to be settled by the Master in case the parties differ; with liberty to apply," &c. In *Lavender v. Roberts* (a), *Warren v. Barling* (b), and *Langdon v. Wilmot* (c), the decree was in the same form.

In *Meux v. Ferne* (d), and *Spring v. Allen* (e), a sale was directed instead of a foreclosure; but in both these cases the mortgagor was allowed six months to pay the debt.*

It appears, therefore, that, upon the only point before me, namely, whether, in case of an equitable mortgage by deposit of title-deeds, the mortgagor shall be allowed six months to redeem, the precedents are uniform in favour of his being allowed that time; and that such practice is strictly conformable to the principles and doctrine of the Court upon the subject.

I am, therefore, of opinion that the decree must be drawn up, giving the mortgagor six months to redeem.

* In these two cases the decree was as follows:—Defendant to pay in six months after report, and in default, the estate, or a sufficient part, to be sold, &c. Money to be paid into the Bank. Further directions reserved.

(a) 28th of June 1806.

(d) 5th of February 1818.

(b) 10th of April 1818.

(e) 12th of February 1830.

(c) 25th of February 1828.

1833.

HARRISON v. NETTLESHIP and FULLER.

ROLLS.
Nov. 19. 25.

THE Defendant *Fuller* purchased an estate of *Nettleship* for the sum of 1452*l.*, and not having at command more than half of that sum, the Plaintiff, *Harrison*, agreed to become his surety, and gave three promissory notes to the Defendant, *Nettleship*, for sums amounting together to the remaining moiety of the purchase-money. The two Defendants, *Fuller* and *Nettleship*, afterwards had extensive dealings together, and the bill alleged that, in the course of such dealings, the Defendant *Nettleship* was at one time indebted to *Fuller* in a larger sum than the amount of the promissory notes given by the Plaintiff.

A court of equity has no jurisdiction to relieve a plaintiff against a judgment at law, where the case in equity proceeds upon a ground equally available at law and in equity; but the plaintiff must establish some special equitable ground for relief.

Fuller having become insolvent, and an action having been brought by *Nettleship* against *Harrison*, to recover the amount of two of the promissory notes which remained unpaid, the bill was filed by *Harrison* for an injunction against that action, and for an account. The common injunction for want of answer had been obtained, and upon the answer coming in, the injunction was dissolved upon motion before the Vice-Chancellor, and the Plaintiff afterwards appealed to the Lord Chancellor, who affirmed the Vice-Chancellor's decision. The action at law was afterwards tried, and *Harrison* pleaded a set-off, insisting that the balance which he alleged to have been at one time due from *Nettleship* to *Fuller* was to be considered as a satisfaction for the notes on which the action was brought; but his plea failed, and judgment was obtained against him in the action.

1833.

HARRISON
v.
NETTLESHIP.

The question raised in the cause was, whether a Plaintiff in equity, who had pleaded a set-off in an action at law, and failed, could sustain a bill, without a special equitable ground, for an account relating to the same transactions in respect of which he had pleaded a set-off.

Mr. *Bickersteth* and Mr. *Barber*, for the Plaintiff.

There are many cases in which a court of equity will relieve after verdict, as where the plaintiff at law has recovered a verdict against conscience; and this relief will be granted, even where the equity, upon which it is claimed, might well have been used as matter of defence at law; *Countess of Gainsborough v. Gifford*. (a) In *Hankey v. Vernon* (b) it is decided, that an admission by the defendant in equity of a material fact which the plaintiff in equity failed to prove at law, is a ground for an injunction; and it is here admitted by *Nettleship*, in his answer, that in the course of the transactions between him and *Fuller*, the balance in favour of *Fuller* amounted to a much larger sum than that afterwards claimed by *Nettleship* against the surety. In *Chennel v. Churchman* (c), where the defendant had put in suit against good conscience certain promissory notes given by the plaintiff, the Court granted a perpetual injunction. *O'Connor v. Spaight* (d), shews that the Court has jurisdiction to entertain such a bill as the present. In that case, there being complicated accounts between a landlord and tenant, and the landlord having brought ejectment, the tenant filed his bill for an account upon the footing of the dealings between him and his landlord. Judgment was given for the plaintiff at law in the action of ejectment shortly after

(a) 2 P. Wms. 424.

(b) 2 Cor, 12.

(c) 3 Bro. C. C. 16. n.

(d) 1 Scho. & Lef. 305.

after the filing of the bill ; but Lord *Redesdale* thought the plaintiff's case a proper case for equitable relief.

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v.
NETTLESHIP.

Mr. *Pemberton* and Mr. *Koe*, *contra*.

All the cases cited turn upon the circumstance, that there was some special ground for equitable relief ; and here there is no special ground. *O'Connor v. Spaight* has some analogy to the case before the Court in the circumstances under which the bill was filed ; but in that case no set-off was pleaded in the action at law, and the judgment was given by consent. Unless the Plaintiff can shew some special ground for relief, the Court will not interfere against the verdict at law. The Plaintiff had abundant opportunity before the trial at law to establish his equity, if he had any ; but the Vice-Chancellor and the Lord Chancellor were both of opinion, that there was no ground for continuing the injunction. The case, therefore, is wholly distinguishable from those in which relief has been granted, upon some special equitable ground, against a judgment at law.

The MASTER of the ROLLS.

A court of equity has no jurisdiction to relieve a plaintiff against a judgment at law, where the case in equity proceeds upon a ground equally available at law and in equity, unless the plaintiff can establish some special equitable ground for relief. In the case of the *Countess of Gainsborough v. Gifford*, the defendant admitted in his answer that he had recovered from the plaintiff a larger sum than was in conscience due to him. In *Hankey v. Vernon* (a), the plaintiff alleged that he had, since the judgment obtained against him by the assignee of the bankrupt

(a) 3 Bro. C. C. 313.

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HARRISON
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NETTLESHIP.

bankrupt Mrs. *Tyler*, discovered that part of the money which he had advanced to Mrs. *Tyler* subsequent to her bankruptcy, and the recovery of which was the subject of the action brought by the assignee, had been applied by her in payment of creditors, in whose place he was entitled to stand against the estate of Mrs. *Tyler*; but his claim failed, and his bill was dismissed. In *O'Connor v. Spaight*, the defendant had obtained judgment in ejectment, in respect of a clause of re-entry upon non-payment of rent; and the bill alleged that there had been many dealings between the plaintiff and the defendant, which were the proper subject of an account in equity, and from which account it would appear, that, at the time of the judgment, there was a balance due from the defendant to the plaintiff more than equal to the rent in arrear. These cases, therefore, are no authorities in support of the decree now sought by the Plaintiff, and the bill, which has been brought to a hearing in opposition to the former judgments of the Vice-Chancellor and the Lord Chancellor, must be dismissed with costs.

1821.

ANDERSON v. ANDERSON.*

1821.
June 22.
July 5.

1822.
Nov. 15.

THE will of *Squire Knight*, dated the 21st of November 1806, contained the following bequest:—
“ I further say, after my death, I leave to my daughter, *Diana Knight*, a leasehold house, being No. 23., situate in *Brunswick Street*, and another leasehold house, being No. 6., situate in the *Green Walk*, both in the parish of *Christ Church*, in the county of *Surrey*, to take the rents thereof for the whole term of the leases, for her own and sole use, free of control of any present husband, or any husband to come; the said *Diana Knight*, my daughter, to keep good the payment of the ground rent, or any thing else that concerns the leases.” And the testator appointed his wife, *Diana Knight*, sole executrix of his will.


A testator bequeathed leasehold property to his daughter for her own and sole use, free of control of any present husband, or any husband to come. The daughter was unmarried at the date of the will, and at the death of the testator. She married without a settlement, and, having shortly afterwards separated from her husband, she filed a bill against him, claiming to be entitled to the leasehold property bequeathed to her separate use: Held, that she was so entitled; and a conveyance to the Plaintiff, to her sole and separate use, was directed accordingly.

The testator died on the 25th of December 1808, and his will was duly proved by *Diana Knight*, his widow. *Diana Knight*, the daughter, by virtue of the above stated bequest, and of the assent of her mother, the executrix to that bequest, shortly after the death of the testator, entered into possession of the two leasehold messuages, and she furnished and occupied the house in *Brunswick Street* for her own use, and let the other to a tenant at a yearly rent.

On

* Mr. *Blenman* having communicated his briefs in this case to the reporters, it has been considered expedient to publish the case at this time, in consequence


of its application to the important subject recently discussed in *Massey v. Parker, Woodmeston v. Walker, &c.*

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On the 4th of *November* 1817, *Diana Knight* the younger intermarried with the Defendant, *Thomas Anderson*, who was a journeyman tin-manufacturer, possessed of no property; and no settlement was made upon their marriage. *Thomas Anderson*, after the marriage, resided with his wife in the house in *Brunswick Street*, until the 20th of *December* 1817; when, some previous disputes having taken place between him and his wife, respecting the letting of the house in *Brunswick Street*, and their removal to a lodging, *Anderson* took away the whole of the furniture from the house, and let a tenant into possession of it; and his wife went to the house of her mother, and from that time lived separate from her husband.

The bill was filed on the 30th of *April* 1821, in behalf of *Diana Anderson*, by her next friend, against her husband, the Defendant; and, after stating the above mentioned circumstances, it proceeded to allege, that the Defendant had, ever since he turned her out of possession of the house in *Brunswick Street*, received the rents, as well of that house as of the other leasehold messuage, from the tenants who were in the occupation thereof; and it charged, that the Defendant had, on various occasions, threatened to oblige the Plaintiff to give up her separate property, and had threatened her with personal violence, and resorted to measures of force and constraint, in order to compel her so to do. The bill further charged, that the Defendant had refused to maintain the Plaintiff and her infant child, and it prayed an account against the Defendant of the rents received by him in respect of the two leasehold messuages, and that the Defendant might be decreed to assign the said leasehold messuage to a trustee for the sole and separate use of the Plaintiff, and that he might be restrained by injunction from receiving the rents, or
 from

from otherwise intermeddling with, or interrupting and disturbing the Plaintiff in the enjoyment of her separate property.

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The Defendant by his answer stated, that, previously to his marriage with the Plaintiff, and after the banns had been published, the Plaintiff proposed to him to execute a settlement of the leasehold property in question, in order that the same might be settled to her separate use; that he positively refused, both at that time, and afterwards in the presence of the Plaintiff's brother, to execute any such settlement; and that on the 25th of *September* previous to his marriage with the Plaintiff, he wrote and sent a letter to her to the following effect: —

“ Miss *Diana*,

“ I have taken our business into consideration, and have to inform you, respecting the houses, I shall not sign any thing about them. If you cannot trust me with the houses, I think you would be to blame to trust yourself. I think it is averse to reason; I think it makes a man look submissive, and a woman tyrannical for to take upon herself the management of houses when she has a husband. I should not have the least objection for you to have the 20*l.* or 25*l.* per annum arising from the factory. If this does not meet your approbation, the business will here end. You will then please to inform me respecting my goods, what you intend to keep; if you have not got the money at present, pay me for them in two or three weeks, for it is my intention to settle the business one way or the other. An answer will greatly oblige your humble servant,

“ *Thomas Anderson.*”

The Defendant's answer went on to state that, after, the delivery of the letter, which was on the 8th of *October*,
 the

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the Defendant received a message from the Plaintiff, informing him that she would marry him, without any settlement of her property, if he would promise not to sell the houses; which promise he afterwards made to the Plaintiff, and had not attempted to depart from. The Defendant further stated, that it was fully understood and agreed between him and the Plaintiff, previously to their marriage, that the Plaintiff gave up all claim or right to have the property in question settled or secured to her separate use, and that he married the Plaintiff upon the faith of such agreement, and in the full confidence and assurance that by the marriage he would become entitled to the said property, and that the same would be and remain at his disposal. The Defendant further stated, that, being desirous of leaving the house in *Brunswick Street*, for the sake of economy and convenience, he had let the same, with the consent of the Plaintiff, and taken apartments, suited to their circumstances in life; but that the Plaintiff had afterwards refused to quit the house, and behaved with great violence; and he admitted that he had, under these circumstances, removed the furniture from the house. He denied, however, the ill-treatment and threats charged in the bill; admitted that the Plaintiff had left the house in *Brunswick Street* at the time mentioned, and had ever since continued to live apart from him; but affirmed that such removal was voluntary and without just reason, and notwithstanding his frequent remonstrances and entreaties to the Plaintiff to return to him; and he submitted that he was not bound to account for the rents received, and that he was by his marriage entitled to the leasehold property in question.

On the 22d of *June* 1821, before the Defendant put in his answer, a motion was made before the Vice-Chancellor (Sir *John Leach*) for an injunction to restrain the Defendant

Defendant from receiving or attempting to receive the rents and profits of the leasehold premises mentioned in the pleadings, and from otherwise intermeddling with the said leasehold premises, the rents and profits thereof, or with any part of the separate property or estate of the Plaintiff, and from interrupting or disturbing her in the enjoyment of the said separate property. The affidavits, filed in support of the motion by the Plaintiff, were answered by affidavits on the part of the Defendant. These affidavits related chiefly to charges of ill-treatment made by the Plaintiff against the Defendant, and to charges of violent conduct imputed by the Defendant to the Plaintiff, and were not relied upon in the argument, which turned entirely upon the question of law.

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Mr. *Sidebottom*, in support of the motion.

Mr. *Heald* and Mr. *Blenman*, *contra*.

A gift to the separate use of an unmarried woman is insensible, so far as the attempt to limit her mode of enjoying, or her power of disposing of the gift is concerned; but even if any effect could be given to the intended restraint in a gift to the separate use of an unmarried woman, the Plaintiff has, by an express agreement previous to her marriage, waived all claim to the separate enjoyment of the property in question; and she cannot call upon a court of equity to give her a benefit which she has waived in consideration of marriage. Under the will of her father she took an absolute interest in the property. The attempt to prescribe the mode of enjoying the property by limiting it to her sole and separate use gave her no interest which she might not have secured for herself; and imposed no obligation upon her to enjoy the property in a particular manner, but must be regarded as wholly inoperative. Even married women are considered

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as *femes soles* with respect to their separate estate; and may, if they think proper, according to the decision in *Pybus v. Smith* (a), and the cases which preceded it, dispose of their separate property to their husbands. It can never be held, therefore, that an unmarried woman, who is *sui juris*, has a more limited power of disposing of property given to her than a married woman. There is no case in which the Court has directed property given to a woman *sui juris* to be settled to her separate use after her marriage, no agreement for a settlement having been made previously to the marriage. If the wife were to prevail in this case, the settlement of the property to her separate use would be a positive fraud upon the husband. A secret conveyance of property, made by a woman pending a treaty of marriage, is fraudulent and void against the intended husband, if the marriage take effect. How, therefore, can the Court direct an assignment to be made which it would set aside if made by the wife herself, pending the treaty of marriage, as a fraud upon the marital right? At all events, this is not a case in which the Court will interfere to restrain the Defendant by an interlocutory order.

The Vice-Chancellor granted the injunction according to the terms of the notice of motion.

On the 5th of *July* following, a motion was made before Lord *Eldon* to discharge the order for the injunction; the same arguments were again urged on behalf of the Defendant, and Lord *Eldon* refused the motion with costs.

The

(a) 5 Bro. C. C. 340.

The Plaintiff afterwards moved for an order for a receiver of the rents of the leasehold houses; and a receiver was appointed.

1822.

 ANDERSON
 v.
 ANDERSON,

The cause came on to be heard before Sir *John Leach* on the 15th of *November* 1822, when his Honor decreed, that it be referred to the Master to approve of a proper person to be trustee of the leasehold premises in question, to the sole and separate use of the Plaintiff, and that all proper parties should join in assigning the premises to such trustee when appointed; the injunction and receiver to be continued in the mean time. And an account was directed of the rents and profits received by the Defendant, from the time when the Plaintiff served the tenants with notices not to pay the rents to the Defendant.

1833.

ROLLS.
1833.
Feb. 16.

PAUL v. HEWETSON.

A testator bequeathed 2000*l.* consols to trustees, upon trust to pay the interest to his daughter *S.*, to her separate use, during her life; the principal to go to her heirs, or any other she might choose to will it to. *S.* married, and, by a deed in the *Scotch* form, and executed in *Scotland*, reciting the will, she granted and assigned the 2000*l.* consols, from and after her decease, to and in favour of her husband and his son by a former marriage: Held, that the words "to will it," meant to dispose of it by will, and that the disposition of the fund by the deed in the *Scotch* form was not a valid execution of the power.

JOHN HEWETSON bequeathed 8000*l.* 3 per cent. consols to trustees, upon trust to pay 60*l.* per annum, being the interest of 2000*l.*, to each of his four daughters, "for their own private use, during their natural lives, independent and without the let or hindrance of any other person, the principal to go to their heirs, or to any other they might choose to will it to."

After the death of the testator, *Susanna*, one of his four daughters, married *John Paul*, the father of the Plaintiff, *William Wight Paul*, who was the eldest son of *John Paul* by a former marriage. By a settlement dated the 20th of *January* 1813, made previously to the marriage of *John Paul* and *Susanna Hewetson*, the sum of 5000*l.* 3 per cent consols, being part of the fortune of *Susanna Hewetson*, was settled upon trust for the benefit of the intended husband and wife, and the issue of the marriage; and in the event of failure of issue, a power of appointing the same was given to *Susanna Hewetson*; and it was declared and agreed between *John Paul* and *Susanna Hewetson*, that the settlement thereby made was not intended to alter or affect the trusts of the sum of 2000*l.* 3 per cent consols, which *Susanna Hewetson* was entitled to under the will of her father.

The marriage took effect immediately after the date of the settlement, and by a deed in the *Scotch* form, dated the 5th of *October* 1813, executed by *Susanna Paul* (*Mr. Paul* and his wife being then resident in *Scotland*, where the deed was made), *Susanna Paul* did, after reciting

citing the will of her father and her marriage settlement, and stating that she had resolved to exercise the power of disposing of the said sum of 2000*l.* consolidated bank annuities, given to her by the said will, and also to exercise the power of disposing of the said sum of 5000*l.* consolidated bank annuities, in the event of the failure of issue of the marriage between the said *John Paul* and her, given by the said deed of settlement, thereby give, grant, assign, and convey, from and after her death, to and in favour of the said *John Paul*, her husband, in life-rent, and the Plaintiff therein described as the eldest son of the said *John Paul*, procreated of the marriage between him and *Margaret Wight*, his first wife, and the heirs of his body; whom failing, to the children to be procreated of the marriage between her the said *Susanna Hewetson* or *Paul*, and the said *John Paul*, in such proportions as the said *John Paul* or she, the said *Susanna Hewetson* or *Paul*, or the survivor of them, should appoint by a writing under their hand; and failing thereof, to the said children, equally among them, share and share alike, and the heirs of their bodies; whom failing, to the said *John Paul*, his heirs or assigns whomsoever in fee, the said sum of 2000*l.* 3 per cent. consolidated bank annuities, given to her under the will of her father.

Susanna Paul died, without having had a child, in September 1817, leaving her husband, *John Paul*, surviving her; and *John Paul* died in February 1819. The bill was filed by *William Wight Paul* against the next of kin of *Susanna Paul*; and it prayed a declaration that, upon the death of *John Paul*, the Plaintiff was entitled to the 2000*l.* 3 per cent. consols, under the deed of the 5th of October 1813.

Mr. *Bickersteth* and Mr. *Wigram*, for the Plaintiff.

The

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The words "to go to her heirs or any other person she might choose to will it to," gave Mrs. *Paul* an absolute power of directing to what persons the principal should go after her death. The word *will* does not necessarily mean to give by testament; it may have reference to any other mode of exercising her volition, as well as to a disposition by testament; and the disposition which she made by a deed in the *Scotch* form, which was, indeed, in the nature of a testament, was a good execution of her power. The words in the deed, "from and after her death, to and in favour of *John Paul*," &c., are sufficient to constitute a testamentary instrument, supposing the execution by will to have been indispensable.

Mr. *Pemberton* and Mr. *Teed*, for the next of kin.

This is an express limitation to Mrs. *Paul* of a life-interest in the fund to her separate use, the fund itself being given, after her decease, to her *heirs*. The word "heirs" must be taken to mean her children or next of kin. It is clear that the testator, who limits this property to her separate use during her life, and expressly designates her heirs as the objects of his bounty, could never have intended that she should have the power of disposing of it to the prejudice of any children she might have had by her marriage, and in favour of the son of her husband by a former marriage. The instrument executed by Mrs. *Paul* is a deed; and it is settled that a disposition by deed, under a power of appointing by will, is not a valid execution of the power.

Mr. *Bickersteth*, in reply.

The MASTER of the ROLLS was of opinion, that the words "to will it" meant, to dispose of it by will; and that the appointment by the deed in the *Scotch* form was not a good execution of the power.

1899.

HOCKLEY v. BANTOCK.

ROLLS.
Nov. 26.

THE question in this cause was referred to the arbitration of *Robert Monsey Rolfe*, Esq., barrister-at-law, who awarded that part of the costs to be taxed should be paid out of a fund in Court, and the other part by the Defendant *John Bantock*, who was the petitioner. The Plaintiffs, *Hockley* and his wife, employed as their solicitor in the cause *Mr. W. H. Pattison*, who resided in the country, and Messrs. *Brooksbank* and *Farn*, solicitors in *London*, were concerned in the prosecution of the suit as his agents.

A solicitor may practise in the name of an attorney as his agent in the courts of law, but an attorney-at-law cannot practise in the name of a solicitor, as his agent in the courts of equity.

Upon the taxation of costs before the Master, in pursuance of *Mr. Rolfe's* award, it was discovered that *Mr. Pattison*, although an attorney in the Court of Common Pleas, had not been admitted a solicitor in the Court of Chancery; and it was thereupon insisted on the part of the petitioner, that on the taxation *Mr. Pattison* should be allowed those fees only which he had paid to the clerk in Court. The Master, however, overruled this objection, and proceeded to tax the costs as if *Mr. Pattison* had been actually a solicitor, upon the ground that Messrs. *Brooksbank* and *Farn*, his agents, being solicitors in Chancery, were to be considered the solicitors in the cause. *Mr. Pattison*, in consequence, obtained a sum out of Court, in part of the amount of the bills so taxed, and the petitioner, in order to avoid an attachment, was compelled to pay the sum of 94*l.* for the residue of the taxed costs. The petition prayed that the Master might review his taxation, and that *Mr. Pattison* might be allowed those fees only which had been paid by him to his clerk in Court, or that he might replace

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in Court, and repay to the petitioner what he had improperly received.

It was admitted at the bar, that *Mr. Pattison* was not a solicitor, and that Messrs. *Brooksbank* and *Farn*, who acted as his agents, were not aware of that fact.

In support of the petition the following cases were cited; *Prebble v. Boghurst* (a), *Coates v. Hawkyard* (b), *Sumner v. Ridgway*. (c)

Against the petition it was contended, that by the 2 G. 2. c. 23. s. 10. an attorney was at liberty to practise in the Court of Chancery in the name of a solicitor, as his agent; and further, that the petitioner could not avail himself of the objection that *Mr. Pattison* was not a solicitor, the client who employed *Mr. Pattison* being alone competent to raise that objection.

Mr. Pemberton and *Mr. L. Lowndes*, in support of the petition.

Mr. Bethell, contra.

The MASTER of the ROLLS.

I have read the tenth section of 2 G. 2. c. 23. with great attention. It is clear that it contains no provision to enable an attorney to practise in the name of a solicitor, as his agent; a solicitor may, under that section of the act, practise in the name of an attorney, as his agent; but an attorney cannot practise in the name of a solicitor. There is here no doubt that *Mr. Pattison* did conduct the suit of his client by his agents, who were

(a) 1 *Russ. & Mylne*, 744.

(c) 1 *Russ. & Mylne*, 748.

(b) *Ibid.* 746.

were solicitors, and who were not aware that Mr. *Pattison* did not himself fill the character of a solicitor.

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I am of opinion, therefore, that the case of Mr. *Pattison* falls within the effect of the decisions to which I have been referred. The only difference between this and the cases cited is, that in those cases the client sought relief against the attorney who had acted as his solicitor, and here it is not the client, but it is the person who is ordered to indemnify the client in respect of the costs; and the question is, what costs, under such an order, is this party to pay? He is to pay the costs which the client is legally bound to pay. The client was not legally compellable to pay to Mr. *Pattison* more than the fees which Mr. *Pattison* had by his agents paid to his clerk in Court; and these, therefore, are the only sums in respect of which the petitioner is liable.

Let the Master review his report, allowing to Mr. *Pattison* those fees only which he has paid to his clerk in Court, and Mr. *Pattison* must repay what, upon such review, it shall be found that he has improperly received out of Court, or from the petitioner.

Ex parte BOND.

Rolls.
1835.
March 3.

MR. *CAMPBELL* applied for the usual reference to the Master to inquire whether a father was of ability to maintain the infant, and, if not, what would be a proper allowance for the infant's future maintenance; and also, whether any and what allowance ought to be made to the father for the infant's past maintenance. In support of the application for an inquiry as to an allow-

The Court will not direct an inquiry as to the propriety of an allowance to the father for the past maintenance of the infant, unless a special case be made.

1835.

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BOND.

ance for past maintenance, he relied upon *Reeves v. Brymer* (a), where it was said, that the old practice was, that if a father had by any means maintained his children, the Court would not reimburse him, but that since Lord *Roslyn's* time a different practice had been introduced. Lord *Eldon* expressed his approbation of the altered practice, and allowed maintenance for the time past as well as for the time to come, both in *Reeves v. Brymer* and in a subsequent case of *Sherwood v. Smith*. (b)

The MASTER of the ROLLS* said, he had on several recent occasions made inquiry as to the practice, and found that it was contrary to that stated to have been introduced by Lord *Roslyn*. To allow for past maintenance, and to treat as a debt the expenditure which the law imposed upon the father as a duty, would be to act against the settled rule of the Court. The Court might, if a special case were made, direct an inquiry; but here the inquiry as to past maintenance was asked for as a matter of course, and must, consequently, be refused.

The Registrar in Court said, that the cases referred to by Mr. *Campbell* had not been acted upon.

(a) 6 *Ves.* 425.

(b) 6 *Ves.* 454.; see *Maberley v. Turton*, 14 *Ves.* 499.

* Sir C. Pepys.

1832.

RANELAGH v. RANELAGH.

1832.
ROLLS.
Feb. 21.

THE testator, Lord *Ranelagh*, made a codicil to his will in the following words:—

1834.
L. C.
March 3. 8.

“ My daughter, *Mary Ann Jones*, having a fortune of 10,000*l.* which I hold in trust for her, &c., I give her for the present only 200*l.* to buy mourning. I give to my two daughters, *Sarah Antonia Jones* and *Louisa Jones*, during their natural lives, 4000*l.* each. I give to my two sons, *Thomas Cowley Jones* and *Thomas Edward Jones*, 2000*l.* sterling each during their natural lives, legal interest at 5 per cent. to be paid to all of them in equal quarterly payments, commencing from the day of my decease till my son, the Honourable *Thomas Jones*, or my heir in entail, attains his or her twenty-first year of age. To prevent any mistake or misconception of my directions, I repeat my intentions respecting the above legacies in figures;

If separate legacies are given to two or more persons, with a limitation over to the survivor or survivors in case of the death of either without issue, the presumption *primâ facie* is, that the testator had not in his contemplation an indefinite failure of issue.

Where pecuniary legacies were bequeathed to several persons for their lives, and if any of them should die without issue, their proportions to be divided

“ To my daughters

Mary Ann Jones, £200, to be paid forthwith.

Sarah Antonia Jones, £4000

Louisa Jones, - - 4000

Two sons { *Thomas Cowley Jones*, 2000
Thomas Edward Jones, 2000

£5 per cent. interest to be paid quarterly till my heir is twenty-one years of age.

“ In among the survivors, the sums were

directed to be secured in Court, and the dividends paid to the legatees for their respective lives, with liberty to any person to apply upon the death of each legatee.

Whether such legatees took an absolute interest in their respective legacies, subject to an executory bequest over in case of their death leaving no issue, or whether they took an interest for life only, *quære*.

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"In case of the demise of any of the above parties without legitimate issue, their, his, or her proportions to be divided equally amongst the survivors."

The testator's eldest son, the Honourable *Thomas Jones*, now Lord *Ranelagh*, was appointed residuary legatee.

At the hearing of the cause, it was contended on behalf of the two daughters and the two younger sons, that they took an absolute interest in their respective legacies, on the ground that the gift over in case of the demise of any of them without issue, was to be referred to an indefinite failure of issue.

The cases cited were *Wilmot v. Wilmot* (a), *Crowder v. Stone* (b), *Massey v. Hudson* (c), *Gray v. Shawne* (d), *Davidson v. Dallas* (e), *Barlow v. Salter* (g), *Doe dem. Watts v. Wainewright* (h), *Wyld v. Lewis* (i), *Horton v. Horton*. (k)

The MASTER of the ROLLS.

The cases upon this point are numerous, and may not all be capable of being reconciled. The single question now before the Court is, whether the legatees in question take an immediate absolute interest or a present life interest only ; and this depends upon the effect of the limitation in case either of the legatees should die without legitimate issue, — whether the testator intends by this limitation an indefinite failure of issue, which would

(a) 8 *Ves.* 10.

(b) 3 *Russ.* 217.

(c) 2 *Mer.* 130.

(d) 1 *Eden*, 153.

(e) 14 *Ves.* 576.

(g) 17 *Ves.* 479.

(h) 5 *T. R.* 427.

(i) 1 *Atk.* 432.

(k) *Cro. Jac.* 74.

would be too remote, or a failure of issue living at the death of the legatees.

1832.

 RANELAGH
 v.
 RANELAGH.

I adopt the language of Sir *William Grant*, in *Massey v. Hudson* (a), and take the rule to be, that *primâ facie* a bequest over to the survivor or survivors of two or more persons after the death of one without issue, affords the presumption that an indefinite failure of issue could not be in the testator's contemplation. In that case Sir *William Grant* considered that the presumption was repelled because the limitation over was to the survivor, his or her executors, administrators, and assigns, and the testator, therefore, had not solely in view the personal enjoyment of the survivor. In this case there is no circumstance to repel the presumption; on the contrary, the presumption is here fortified by the fact, that the legacies are in the first place given for life only, and the limitation over is upon the determination of the life estate, to which determination the survivorship must be referred. If this plain rule be adhered to, there will be no confusion in subsequent cases. The case of *Crowder v. Stone* (b) has, upon the effect of the word "survivor," application to this case, but some other points in that case may be questioned.

I give no opinion as to the effect of the word "survivors," in case it should not happen that one of the legatees dies, leaving issue, before the death of another legatee who leaves no issue. The legacies must be carried to the separate account of each legatee, and laid out with a direction to pay the dividends to each legatee during his or her life, or until the further order of the Court, with liberty to any person interested to apply upon

(a) 2 *Mer.* 130.

(b) 3 *Russ.* 217.

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 v.
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upon the death of each legatee, or otherwise as they may be advised.

1834.
 March 3.

A petition of appeal was presented against his Honor's decree.

Mr. *Twiss* and Mr. *Stuart*, in support of the appeal.

The legatees took under this bequest a *quasi* estate tail, which, the subject of the gift being personalty, was, in effect, an absolute interest in their several legacies. Upon no other construction can the issue of these legatees derive any benefit from the testator's bounty, for nothing is given to them expressly; and it is clear, from the decisions in *Andree v. Ward (a)*, and *Greene v. Ward (b)*, that they can take nothing by implication as purchasers. The general principle is, that where the words of gift are such as to create, in the first taker, an estate tail, either express or implied, which is the case here, the legal operation of those words shall not be cut down or controuled by subsequent provisions; and that where, on the contrary, the first limitation is made in terms large enough to carry a fee simple or absolute interest, and is followed by a gift over in case of the death of the first taker without issue, the presumption is in favour of restricting the failure of issue to a failure of issue living at the first taker's decease: *Wyld v. Lewis (c)*, *Powell on Devises (d)*. Reliance is placed, on the other side, upon the effect of the word "survivors," as shewing an intent on the testator's part to cut down these to mere legacies for life. But what is the legal import of the word? Upon that point, the decision in

Hughes

(a) 1 *Russ.* 260.

(b) *Ibid.* 262.

(c) 1 *Atk.* 432.

(d) Vol. ii. p. 582. by *Jarman*.

Hughes v. Sayer (a), which went upon the ground of the personal enjoyment intended for the survivor, was over-ruled, in the following year, by *Nicholls v. Skinner* (b), a case originally misreported, but which, as corrected by Sir *William Grant* in the note to *Massey v. Hudson* (c), has been uniformly followed as an authority. In *Barlow v. Salter* (d), the proposition is laid down broadly by Sir *William Grant*, that the word "survivors," when used in this way, does not imply any thing of a personal nature, but is simply equivalent to the word "others;" and those who died leaving issue, were there held to be equally entitled with those who survived: *Harman v. Dickenson* (e). It is true that the judgment in *Barlow v. Salter* appears not quite consistent with the language of the same judge in *Massey v. Hudson* (c); but the *dicta* of Sir *W. Grant* in the latter case were entirely extra-judicial: *Gray v. Shawne* (g), *Doe dem. Watts v. Wainwright* (h), *Wilmot v. Wilmot* (i), *Lampley v. Blower* (k). The direction that 5 per cent. is to be paid on the respective legacies till the testator's heir comes of age, is strong to shew that the indefinite construction was intended; for, otherwise, there was no reason why interest should be paid to them any longer than while they were kept out of their legacies. The decree is defective, in omitting to declare the rights of the parties who were entitled to have such a declaration at once, without being forced to make a subsequent application for that purpose.

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Mr. West, for Lord *Ranelagh*, the residuary legatee.

The

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| (a) 1 <i>P. Wms.</i> 534. | (g) 1 <i>Ed.</i> 153. |
| (b) <i>Prec. Ch.</i> 528. | (h) 5 <i>T. R.</i> 427. |
| (c) 2 <i>Mer.</i> 135. n. | (i) 8 <i>Ves.</i> 10. |
| (d) 17 <i>Ves.</i> 479. | (k) 3 <i>Atk.</i> 396. |
| (e) 1 <i>Bro. C. C.</i> 91. in Mr.
<i>Belt's</i> note. | |

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The Master of the Rolls considered these to be mere life-estates, although he declined formally to decide the question until the events should have occurred which would render a decision necessary. *Hughes v. Sayer* (which is precisely this case) is perfectly consistent with *Nicholls v. Skinner*, and has never been over-ruled. Although the word "survivors" has been sometimes construed as synonymous with "others," where the context required it, that is by no means its natural and ordinary, far less its necessary, import: *Crowder v. Stone* (a), *Davidson v. Dallas* (b), *Massey v. Hudson* (c). The word "issue," as it occurs in this codicil, is synonymous with "children:" *Doe dem. Smith v. Webber* (d). The principle upon which *Nichols v. Hooper* (e) and *Pleydell v. Pleydell* (g) were determined, strongly supports his Honor's decision. The word "survivors" must be referred, not to the time of the testator's death, but to the period of distribution: *Cripps v. Wolcott* (h), *Pope v. Whitcombe* (i). The cases of *Andree v. Ward* and *Greene v. Ward*, which have been cited on the other side, are really strong authorities in favour of the residuary legatee; for it was there decided, that where the bequest was to A. for life, and, if he leaves no issue, then to B., and A. died leaving issue, his interest was not enlarged, by implication, to a *quasi* estate tail; that the issue could not take as purchasers; that the gift over to B. failed, the prescribed contingency not having happened; and that the capital of the fund, being otherwise undisposed of, fell into the residue. *Greene v. Ward* afterwards came before Lord Lyndhurst on appeal, and was affirmed.

Mr.

(a) 3 *Russ.* 217.

(b) 14 *Ves.* 576.

(c) 2 *Mer.* 130.

(d) 1 *B. & Ald.* 713.

(e) 1 *P. Wms.* 198.

(g) *Ibid.* 748.

(h) 4 *Mad.* 11.

(i) 3 *Russ.* 124.

Mr. *Tinney*, for the infant child of *Sarah Antônia Jones*, one of the legatees.

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The issue of the legatees take by implication as purchasers an absolute interest in the legacies, subject to a prior life-interest in their parents. Certainly, if *Greene v. Ward* be law, it is difficult to support such an implied bequest in favour of the children, but that case does not seem to have been much considered; and it is at variance with the decision in *ex parte Rogers* (a), where a bequest to a married woman for life, and at her death without children the principal to go to her surviving sisters, was held by Sir *Thomas Plumer* to amount to a gift of the capital, by necessary implication, to the children. That case apparently was not referred to in the course of the argument in *Greene v. Ward*.

The LORD CHANCELLOR, after stating the codicil and the nature of the question which it raised, continued as follows:—

March 8.

In the present instance four circumstances are to be found, all tending to rebut the construction which would give an absolute interest to the legatees.

First, where the testator intended beyond all question to give an absolute interest to one legatee, he does so in different words from those used in giving to the rest. The eldest daughter being provided for by settlement, he only leaves her a moderate sum, and for mourning, manifestly therefore a legacy absolute; and not satisfied with this distinction in the subject-matter of the gift, nor even content with omitting the words “for her natural life,” which he adds to all the other bequests, he expressly directs it to be paid “forthwith.”

Secondly,

(a) 2 *Mad.* 449.

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Secondly, all the other legacies are given, not only without any such direction, but the rate of interest which the legatees are to have for a given period of time, namely, during the eldest son's minority, is specified.

Thirdly, those other legacies are all expressly given, first, to the two daughters during their natural lives, and then to the two sons in like manner during their natural lives ; so that not only does the effect of the bequest over come to be considered, after an express gift for life only has been previously limited, but there is also a particular period of time fixed, to which the vesting in the legatees over may be referred, and by which any ambiguity in the description of those legatees may be removed.

Lastly, the gift over on failure of issue of those who are to take during their natural lives is to the "survivors," the survivors of the parties.

If these circumstances are all taken together, they greatly favour the opinion that the life-interest at first given is not enlarged by the subsequent gift over, and that the word "survivors" is used in its plain and obvious sense, as meaning such of the four individuals named as shall be living when any of them shall happen to die. But if such be the meaning of the word, then it is clear that the failure of issue is at once restricted to failure of issue living at the death of the deceased legatee, and consequently, that the executory limitation does not alter, but accords with and confirms the first gift, which was "for the natural life."

The present decision rests upon special circumstances ; viz., the gift of one legacy forthwith ; the fixing of the rate of interest for a given period ; and the express gift for life of the legacies in the first instance. This, therefore,

fore, is not a decision upon the general principle, and does not, indeed, go so far towards it as either the *dictum* of Sir Wm. Grant in *Massey v. Hudson*, or the decision of Sir Joseph Jekyll in *Hughes v. Sayer*. (a)

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The judgment of the Master of the Rolls must be affirmed.

(a) 1 P. Wms. 534.

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BY the custom of the manor of *Marston Maisey*, in the county of *Wilts*, the copyhold lands held of the manor are granted by the lord for two lives in succession; sometimes by an original grant for such two lives, and sometimes by a grant for a life in reversion after a single existing life; and the tenant for life in possession is entitled, upon payment of the usual fine, to have a grant made to him for one life in reversion, and may, at any time, by surrender, pass his estate in the lands for his life and the life so named in reversion; but if no such surrender is made, then the widow of the tenant for life in possession, upon his death, becomes entitled to an estate in the lands for her widowhood as her freebench, and after her death, or second marriage, the person whose life is named in reversion becomes entitled to the lands. The copyhold lands in this manor are not devisable by custom.

The right of the equitable owner of a copyhold estate to dispose of his equitable interest by will, cannot be controlled by the custom of a manor.

A custom, inconsistent with the doctrine of resulting trusts, as, that a person named by the purchaser of a copyhold estate, as the second life according to the custom, shall take beneficially, is unreasonable.

Henry Lane, being possessed of copyhold lands within the above-mentioned manor, which he had purchased in 1797, and in the surrenders of which his nephew, *Henry Lane*, the Defendant, was named as the second life,
made

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made his will in 1804, and he thereby gave and devised all those his lands, tenements, and hereditaments which he held of the manor of *Marston Maissey*, unto his wife, the Plaintiff, for and during the term of her natural life, and after her decease he gave and devised the same to the Defendant *Henry Lane*, son of his brother *William Lane*, his heirs, executors, administrators, and assigns, for all his estate and interest therein.

The testator died in *June* 1820, leaving the Plaintiff, then *Elizabeth Lane*, his widow, surviving him. In *October* 1822, *Elizabeth Lane* was admitted tenant of the copyhold lands for her widowhood; and in *August* 1823 she intermarried with the Plaintiff *Levy Lewis*, and the Defendant *Henry Lane* was afterwards admitted tenant of the copyholds in question. The bill prayed that the Defendant might be declared a trustee of the copyhold lands in question for the testator, and that the Plaintiff *Elizabeth Lewis*, or *Levy Lewis* in her right, might be declared to be beneficially entitled to the same during her life. The Defendant, by his answer, submitted, that by the custom of the manor the person named as grantee or tenant for the life in reversion of a copyhold estate, where no trust as to the same appeared on the court-roll, took for his own benefit; that the devise of the testator affected neither the legal nor the equitable estate in the copyhold lands in question; and that, upon the marriage of the testator's widow, the Defendant, as such grantee or life in reversion, became beneficially entitled to the same.

At the hearing of the cause in *March* 1828, the Master of the Rolls directed a reference to the Master to inquire whether, although by the custom of the manor the legal estate in the premises in question could not be devised, the owner of an equitable estate therein
had

had the power of devising such equitable estate. The Master, by his report, found that it was the custom of the manor for the tenant in possession to surrender the estate for his own life and for the life in succession, and to change the life in succession by substituting another life; that there were many instances of wills in which the testators had made dispositions of copyhold property within the manor; that no custom of surrendering estates to the uses of wills had ever prevailed in the manor; that grants were made to the tenant to hold to him for his life, and for the second life named, and the life of the longest liver successively; and that, in many instances, bonds to surrender had been given by the second life to the tenant in possession. The Master found, that the owner of the equitable estate in the premises in question had the power of devising such equitable estate, and an exception was taken to his report.

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Mr. *Tinney* and Mr. *Whitmarsh*, in support of the exception, relied upon the bonds to surrender, given by persons named as the second lives, as evidence that their legal title would prevail, if such security were not taken by the tenants in possession; and they referred to *Edwards v. Fidel (a)*, as an authority to shew, that a custom for the nominee in reversion of the tenant for life of a copyhold to take beneficially, where no trust was expressed upon the court-roll, was a good custom.

Mr. *Bickersteth*, Mr. *Wilbraham*, and Mr. *J. B. Parry*, *contrâ.*

The purchaser was the owner of an equitable interest in the property of which the legal estate was vested in his nominee. The terms of the reference admit that the purchaser had an equitable interest, and the inquiry in reality

(a) 3 *Mad.* 257.

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reality amounts to no more than this—whether the owner of an equitable interest may by will dispose of that interest. To suppose that the custom of a manor can control the right of an equitable owner to dispose of his property by will, is against all principle and all authority; for *Edwards v. Fidel* is not an authority to that extent. The reference directed in that case seems not to have been well considered, nor is it easy to acquiesce in the opinion expressed by the late Master of the Rolls, that a custom for the nominee of the purchaser of a reversionary copyhold grant to take beneficially, where no trust was mentioned upon the rolls of the manor, was a reasonable custom. The established rule is that, where *A* purchases an estate in the name of *B*., the trust of the legal estate results to the person who advances the money, unless *B*. be the child of the purchaser, in which case, the resulting trust is *prima facie* rebutted, and the child will take the estate as an advancement, supposing there are no other circumstances indicating a contrary intention on the part of the purchaser: *Dyer v. Dyer*. (a) There was an attempt, in the present case, to support the claim of the Defendant on the ground of advancement; but that attempt has been abandoned, the Defendant being only a nephew of the purchaser, and there being no evidence to shew that the purchaser had ever adopted him, or intended to advance him. In *Smith v. Baker* (b), the very question which seems to have occasioned this reference was raised; for there a person was named as a life in remainder, according to the custom of the manor, by the purchaser of a copyhold for lives; and Lord *Hardwicke* decided that the purchaser had an equitable interest; and that, as in the case of a purchaser at law of an estate descendible to the heirs in the name of a third person, which should descend not-

with-

(a) 2 Cox, 92.

(b) 1 Atk. 385.

withstanding, so the trust of the legal estate which passed, according to the custom, to the life in remainder, should be construed as a trust for the person who had advanced the money.

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*The MASTER of the ROLLS.**

It appears that, by the custom of the manor, of which the copyholds in question in this cause are held, the lord grants copyholds for two lives in succession, or for one life in remainder after an existing life; and that *Henry Lane*, the testator, accordingly became entitled by purchase to certain copyholds, to which he was admitted; and that the Defendant, *Henry Lane*, was the other life named by him in the grant. The purchase-money, fines, &c. were all paid by *Henry Lane*, the testator; and there is no question of advancement. *Henry Lane* by his will devised all his copyholds to his wife, the Plaintiff, for life, with remainder to the Defendant, *Henry Lane*. He died in the year 1820; and the Plaintiff, his widow, having, at all events, a title to these copyholds during her widowhood, no question arose until her second marriage with the other Plaintiff; whereupon the Defendant contended that, as the title of the widow had ceased by her second marriage, he, the Defendant, was entitled, insisting that, by means of the copyhold grant, his title was complete, and that *Henry Lane*, the testator, had no right to devise those lands to his widow for life.

By the decree, it was referred to the Master to inquire whether, although, by the custom of the manor, the legal estate in the premises cannot be devised, the owner of an equitable estate therein has the power of devising such equitable estate. The Master has found in

* Sir C. Pepys.

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 ———
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in the affirmative; to which finding an exception is taken, on the ground that the owner of an equitable estate in these copyholds cannot devise the same. The language of the exception, indeed, is, that he has not, by the custom of the manor, the power of devising the copyhold premises; but that is not the question referred by the decree, or upon which the Master has come to his finding.

The reference appears to be such as to raise a self-evident proposition; for it assumes that there may be an equitable interest in these copyholds; and if there may, how can it be that the owner has not the power of devising it? The Master states many instances of trusts declared of these copyholds, some of which have been entered upon the court-rolls by the person for whose life the grant is taken, and others, where such persons have given bonds declaring such trusts, and it is not disputed that, during the life of the grantee, he is absolute owner of the estate, and may dispose of it without consulting the life in remainder; and many instances are mentioned of such equitable interest being devised. Is it, then, to be said, that there can be no resulting trust in this manor, and that, if *A.* purchase in the name of *B.*, and pay the purchase-money, the property shall belong to *B.*, and not to *A.*, for that must be the proposition? And it seems to have been supposed that this is a question of custom, whereas this has nothing to do with the custom any more than other resulting trusts have to do with the tenure or nature of the estate.

In *Dyer v. Dyer* (*a*), a question arose upon a similar custom, but no claim was made by the person named by

(*a*) 2 *Cox*, 92.

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by virtue of the custom; but, being a son, he claimed the copyholds as an advancement. In *Smith v. Baker* (a), a similar claim was made; and Lord *Hardwicke* decided, that the person named as the next life, according to the custom, by the purchaser of a copyhold for lives, was a trustee for the purchaser, and that his interest passed by his will. In the case of *Edwards v. Fidel* (b), the late Master of the Rolls considers this as a question of custom, and says it was a reasonable custom, and prevented disputes. I cannot agree that this is a question of custom at all, or that, if it were, it would be reasonable. So to consider it would be contrary to the principles of resulting trusts, and would be inconsistent with what was decided in *Smith v. Baker*, and assumed in *Dyer v. Dyer*. I am clearly of opinion that the exception must be overruled, and that the Plaintiff is entitled to the decree she asks, except that the Defendant is not to be called upon to surrender as prayed.

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The Plaintiff is entitled to the costs of the suit.

(a) 1 *Atk.* 585.

(b) 3 *Mad.* 287.

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15. 21.

KING v. HAMLET.

Where an expectant heir, under pecuniary pressure, mortgages his reversionary interest to obtain an advance of money or credit for a purchase of goods, and the party in present possession of the property so mortgaged stands in *loco parentis* to such heir, and knows and approves of the transaction, the heir has no equity to have it afterwards rescinded.

Where an expectant heir, who, under pecuniary pressure, has granted securities over his reversionary estate,

subsequently allows the consideration given for the securities to be so dealt with that it can never be restored to the other party in its original condition, he will not be relieved against those securities unless he can shew a continuance of the pressure compelling him to act as he did.

Where goods are sold to a person in distressed circumstances by a tradesman who knows they are bought merely with a view to raise money by selling them again, and they are charged at fair and reasonable prices, the Court will not interfere to relieve the purchaser, or set aside securities given for the price.

THE Plaintiff was the eldest son and heir apparent of Lord Viscount *Lorton*, and, under a settlement dated the 17th of *July* 1827, for resettling the family estates in *Ireland*, and to which Lord *Lorton* and the Plaintiff were parties, the latter became entitled, for the joint lives of his father and himself, to an annuity of 800*l.* charged upon the settled estates, and also to the same estates in remainder for his own life expectant upon the death of Lord *Lorton*. The Defendant, in the year 1828, and for many years previously, carried on the business of a jeweller and silversmith in *Prince's Street, Westminster*.

In the month of *April* 1828, the Plaintiff, having become greatly embarrassed, caused applications to be made on his behalf with a view to procure from the Defendant a loan of money (to the amount, as was at first proposed, of 5000*l.*) on the security of his interest in the settled estates. Eventually the Defendant declined to advance any money; but he stated that he had no objection to sell to the Plaintiff a quantity of plate and jewellery, to the amount of the proposed loan, provided satisfactory security could be given for the price. Accordingly, the further negotiations proceeded upon that footing, and it was agreed that shop goods to the value of 8000*l.* should be purchased by the Plaintiff of the

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Defendant; and Mr. *Newland*, who acted throughout the transaction as the Defendant's agent and solicitor, applied for and obtained from Mr. *Ford*, who acted in the same capacity for the Plaintiff, an abstract of the Plaintiff's title to the *Irish* estates over which the proposed security was to be given. Before the transaction could be completed, the Plaintiff, under the pressure of pecuniary difficulties, disposed of the whole of his interest in the annuity of 800*l.*, the only property in which he had an interest in possession. When this fact was communicated to *Newland*, and through him to Mr. *Hamlet*, the treaty was not broken off, but it became necessary that *Newland*, who had instructions for preparing the proper mortgage deed, should alter the draft by striking out the clause purporting to assign the annuity, and reducing the instrument to a mere conveyance of the Plaintiff's reversionary life-interest in the settled estates.

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On the 28th of *October* 1828, the Plaintiff, who was then about twenty-four years of age, went by appointment, in company with his solicitor, *Ford*, to the Defendant's shop in *Prince's Street*; for the purpose of selecting goods to the amount of 8000*l.* and executing the proposed mortgage. He was there met by *Newland*, who brought with him the mortgage deed, and also other securities, consisting of two warrants of attorney for confessing judgments in *England* and *Ireland* for 16,000*l.*, and a promissory note for 8000*l.* The Plaintiff on that occasion executed and signed the mortgage-deed and the other securities; and various articles of plate and jewellery, including a great number of trinkets and personal ornaments, were at the same time selected or set apart by him and *Ford* out of the Defendant's stock, the shop prices of which amounted to 7713*l.* 6*s.* 6*d.*; and some other articles of silver plate, to the amount of 276*l.* 13*s.* 6*d.*, were also directed to be made or procured, in order to make up the remainder of the sum of 8000*l.*

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Among

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Among the articles thus selected were a diamond necklace, charged at 1155*l.*, two other diamond necklaces, at 509*l.*, two pairs of diamond ear-rings, at 218*l.* 8*s.*, a diamond comb, at 241*l.*, a ruby and diamond suite, at 267*l.*, a suite of pearls, at 1503*l.* 10*s.*, four gold snuff-boxes, at 593*l.* 5*s.*, eight gold chains, and three gold watches.

The mortgage deed bore date the 28th of *October* 1828, and was expressed to be made between the Plaintiff of the one part, and the Defendant (described as of *Cavendish Square*, in the County of *Middlesex*, Esquire) of the other part. After reciting the settlement under which the Plaintiff was entitled to a life estate in remainder in all the family estates in *Ireland*, and that the Plaintiff had already disposed of the whole of his annuity of 800*l.*; that he was justly and truly indebted to the Defendant in the sum of 8000*l.*; and that it had been agreed that that sum and interest should be secured by a conveyance of the Plaintiff's life estate in remainder; and that, by way of further security, two policies of insurance, for the sums of 5000*l.* and 3000*l.* respectively, should be effected in the name of the Defendant upon the event of the Plaintiff's surviving his father; and that the Plaintiff should pay the annual premiums thereupon;—it was witnessed, that, in pursuance of such agreement, and in consideration that the Plaintiff then stood well and truly indebted to the Defendant in the sum of 8000*l.*, as the Plaintiff did thereby acknowledge, and of the said sum did thereby admit the receipt and release the Defendant from the same, the Plaintiff granted and conveyed his said life estate to the Defendant, subject to redemption on payment of 8000*l.* on the day of

1832, with interest at 5 per cent. half yearly, in the meantime; with a proviso, that, in default of payment of the said principal and interest, or any part of the same, it should be lawful for the Defendant, his executors,

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ecutors, &c., of his and their proper authority, without the further concurrence of the Plaintiff, or any other person, and at any time thereafter, to make sale and absolutely dispose of all or any part of the lands, tenements, and hereditaments comprised in the mortgage; and, further, that the Defendant should have authority, without the Plaintiff's concurrence, to grant leases, and also to receive the rents of the estates until sale made, and, out of the monies which should come to his hands, to pay himself all expenses attending the execution of the powers thereby given, and all sums to be paid by him for the premiums on the policies, not exceeding 2000*l.* and interest thereon, and then the 8000*l.* and all arrears of interest; and the Defendant covenanted not to sell or enter into possession until after three months' notice in writing, demanding payment from the Plaintiff.

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The usual receipt for 8000*l.* consideration money was indorsed upon the mortgage deed, which took no notice of the promissory note or warrants of attorney, or the judgments intended to be entered up thereon. The promissory note was for 8000*l.*, payable on demand, and expressed to be for value received, as per bill, for goods sold; and judgment was entered up in *Ireland* on the warrant of attorney executed for that purpose.

The articles of plate and jewellery before mentioned constituted the sole consideration for the mortgage and other securities; and they were not delivered to the Plaintiff till nearly a month after the securities had been executed, and not till *Newland* had obtained payment from the Plaintiff's solicitor of a sum of 400*l.* for his costs and commission in the transaction.

Very shortly afterwards, an advance of 2500*l.* was procured for the Plaintiff, through the agency of *Ford*,

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from

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from Mr. *Robins*, the auctioneer, on a bill of sale of the goods. While the goods were in the hands of Mr. *Robins*, and early in the year 1829, the transaction came to the knowledge of some of the Plaintiff's friends; and, in consequence of an agreement or understanding, that, in the event of Mr. *Hamlet* consenting to give up his bargain, some of them would come forward and redeem the property from *Robins*, an application was made through Mr. *Bridges*, who was the solicitor of the Plaintiff's father, Lord *Lorton*, and who also acted in this business as the solicitor of the Plaintiff himself, with a view to induce the Defendant to give up the securities and take back the goods; and, on the Defendant declining the proposal, the Plaintiff, on the 20th of *January* 1829, filed a bill praying that the mortgage deed, and the other securities taken for the 8000*l.*, might be delivered up to be cancelled, and that the Defendant might be restrained from any legal proceedings in respect of the said sum or securities, and from disposing of the said deed and securities, and the interest thereby conveyed; the Plaintiff offering to return the goods, and in the meantime to deposit them in Court.

Notwithstanding the offer thus made, the goods in question were never redeemed; on the contrary, they were suffered to remain for some time in the hands of Mr. *Robins*, by whom, in the month of *March* 1829, they were put up to sale by auction, among a great variety of other articles of a similar description; the Plaintiff's purchase forming only 74 lots out of a total of 584, of which the sale catalogue consisted. They produced on the sale the sum of 3482*l.* or thereabouts, of which, after deducting the auctioneer's commission and other charges, and the price of a few of the articles which were bought at the sale by the Plaintiff himself, a sum little exceeding 3000*l.* remained available for the Plaintiff's benefit. Of this sum, 2500*l.* were retained by Mr.

Robins

Robins in satisfaction of his previous advance, and the balance, amounting to 528*l.* 10*s.* 9*d.*, was paid into the hands of the solicitor, Mr. *Bridges*, by whom it was applied, together with other monies advanced by Lord *Lorton*, in the discharge of private debts contracted by the Plaintiff. To the bill of *January* 1829, the Defendant appeared and put in his answer; but the suit was prosecuted no further, and it was afterwards, on the Defendant's application, dismissed with costs.

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The Plaintiff remained without any present property or income till the month of *December* 1829, when, in consequence of his marriage, which took place at that time, a suitable provision was made for him.

On the 26th of *July* 1830, the Plaintiff filed the present bill against Mr. *Hamlet*, praying that the Defendant might be ordered to deliver up the mortgage deed and other securities to be cancelled, and, if necessary, might execute a reconveyance and enter up satisfaction on the judgments, on being paid the amount which the Plaintiff had received on the sale of the goods, with interest, or on such other terms as the Court might think fit; and that the Defendant might be restrained from taking any proceedings against the Plaintiff or his estate in respect of the said sum of 8000*l.*, or the interest thereof, or any security for the same.

The Defendant, by his answer, among other things, stated, that he had been informed and believed that the Plaintiff, by his then solicitor, *Ford*, and also by one *James Ferrall*, Esq., whom the answer alleged to be in the confidence of Lord *Lorton*, and to have acted in the negotiation with his Lordship's privity and approbation, applied, in *April* 1828, to *Newland*; when *Ford* requested *Newland* to ask the Defendant to supply the Plaintiff with money and shop goods, to the total amount of

8000*l.*,

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8000*l.*, on having that sum, with interest, secured on the Plaintiff's annuity or reversionary interest, and by an insurance on his life; that when this application was communicated to the Defendant soon afterwards, the Defendant stated, that, unless Lord *Lorton* were privy to it, he would not comply with the application; but that, if his Lordship did not disapprove of it, and the proposed security appeared satisfactory, he would entertain the proposal, although he did not promise to advance money; that the Defendant's reply was (as he had been informed and believed) subsequently communicated to Lord *Lorton* through his confidential friend, Mr. *Ferrall*, and that *Ferrall* thereupon informed *Newland*, and authorised him to state to the Defendant that Lord *Lorton* did not disapprove of the transaction; that the Defendant accordingly consented to supply the Plaintiff with shop goods to the amount of 8000*l.* in price on the proposed terms, and gave authority to *Newland* to act as his solicitor in completing the transaction. The answer further stated, that, after *Newland* had received such authority, and while the transaction was in progress, it was discovered that the Plaintiff had otherwise disposed of his annuity of 800*l.*, and had thereby reduced the proposed security to his reversionary life estate with an insurance on his life; that Lord *Lorton*, as the Defendant believed, was made acquainted with that circumstance, and was desirous, notwithstanding, that the transaction should be carried into effect; that, early in *September* 1828, Mr. Serjeant *Lefroy*, of the *Irish* bar, and his son, Mr. *Anthony Lefroy*, Lord *Lorton*'s son-in-law, had, on his Lordship's behalf, an interview with *Newland*, in the course of which the nature of the business, and of the intended security, as well as the form of the draft mortgage, was fully and correctly stated and explained to them; that those gentlemen expressed themselves perfectly satisfied with the whole transaction; and that Mr. Serjeant *Lefroy* then stated

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his intention of advising Lord *Lorton* to redeem the security proposed to be given to the Defendant. The Defendant, by his answer, further stated, that the transaction was an actual and *bonâ fide* sale; and he denied that it was in the nature of a loan, or that the goods were substituted for money, or that, at the date and execution of the mortgage, he knew or had reason to believe that the Plaintiff had no occasion for the goods, or that he did not intend to keep or use them, or that his object was to raise a sum of money by way of loan by means of such goods; for the Defendant said, that, at the time when *Ford* and the Plaintiff selected the goods, as the Defendant had been informed by his shopmen, and believed to be true, they chose such as would be useful on the marriage of the Plaintiff, and frequently mentioned and referred to such marriage.

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Notice having been given of a motion for an injunction, according to the prayer of the bill, the Plaintiff, in support of the motion, filed the affidavits of himself, Mr. Serjeant *Lefroy*, Mr. *Anthony Lefroy*, Lord *Lorton*, and *Ford*, and the Defendant, in reply, filed the affidavits of *Newland*, of two of his own shopmen, of three working jewellers (who swore that the prices charged for the goods were fair and usual), and of Mr. *Robins*, with respect to the sale of the goods. The motion came on to be heard before the Vice-Chancellor on these affidavits, and on the Defendant's answer; when his Honor granted the injunction, on the terms of the Plaintiff paying into Court the sum of \$130*l.*, being the amount of the net proceeds received by the Plaintiff from the sale, with the addition of the sum of 400*l.* paid to the Defendant's solicitor. The motion came afterwards, by way of appeal, before the Lord Chancellor, who, on the 25th of *May* 1831, affirmed the order with costs.

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When the cause was at issue, evidence was gone into on both sides at considerable length. Mr. Serjeant *Lefroy*, Mr. *Anthony Lefroy*, Lord *Lorton*, Mr. *Ford*, and Mr. *Bridges*, were examined as witnesses on the part of the Plaintiff. Mr. *Newland*, and the other persons who had made affidavits against the motion, as also another of his shopmen, were examined on behalf of the Defendant.

Mr. *Ferrall* was not examined by either party.

The principal points in dispute were, whether, in the conduct of the negotiation, Mr. *Ferrall* was to be considered as the agent of Lord *Lorton*; whether his Lordship had been apprised to any, and what, extent of the particular nature of the transaction, as a dealing, not for money, but for goods; what were the nature and extent of the communications made to his Lordship upon this subject by the Defendant or his agent, *Newland*; how far Mr. Serjeant *Lefroy* and his son had been informed of the character of the pending transaction; and whether they had intervened in such a manner that Lord *Lorton* was to be affected by any information they received. Upon these points the Plaintiff's evidence was not consistent with that of the Defendant; but *Newland's* testimony, in support of the case made by the answer, was positive, and went directly to particular facts; whereas the depositions of the Messrs. *Lefroy* and of Lord *Lorton* rather tended to impeach the truth of his statements by inference, and speaking upon recollection and belief, than by any direct and decided contradiction or denial.

The general result of the evidence is stated and summed up in the Lord Chancellor's judgment.

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The Attorney-General, Sir E. Sugden, and Mr. J. B. Parry, for the Plaintiff.

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The evidence distinctly proves that the transaction originated in a treaty for a loan. It was not the case of a sale of goods in the regular course of business, but an advance of goods in lieu of money, with a view to supply the Plaintiff's necessities, and to enable the Defendant, under the mask of trading, to make a loan at an exorbitant rate of interest, at a moment when the borrower's necessities had placed him at the lender's mercy. The particular character of the articles selected must have satisfied the Defendant that an advance of cash, and not a purchase of goods, was really the Plaintiff's object. The purchase comprised many articles of the same kind; for instance, three diamond necklaces; a diamond and ruby necklace, and a pearl necklace, the price of the latter alone exceeding 1500*l*. Could Mr. *Hamlet* possibly imagine that the Plaintiff mortgaged his reversionary interest, effected large insurances on his life, and gave warrants of attorney for both *England* and *Ireland*, so that neither his person nor his property could escape; and that, too, at a time when he was estranged from his family, and had, to the Defendant's knowledge, disposed of his only present resource, the annuity secured upon the family estates — could he imagine that the Plaintiff entered into liabilities like these, in order to become the possessor of such useless baubles as diamond, ruby, and pearl necklaces? He must have known well that the Plaintiff took them only as a means of obtaining a supply of money. Most of these costly trinkets were chosen by the Plaintiff's agent, Mr. *Ford*, who, it appears from his own evidence, was anxious, in making the selection, to avoid jewellery, and to confine himself to plate, as being a more saleable commodity. To this, however, the same witness swears that the Defendant and his shopman objected, in-

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sisting that the articles should be taken proportionately out of the general stock. The goods were kept back undelivered for nearly a month, till the deeds were registered and the bill of the Defendant's attorney paid, — a singular mode of treating a ready-money customer for 8000*l.* worth of jewellery; for the securities bore interest from the date; and, as against the Plaintiff, therefore, the whole was a ready-money transaction. The subsequent history of the plate and jewellery may be easily conjectured: from the Defendant's shop they were sent to the office of the Plaintiff's attorney; and from his office they soon found their way to the auction-room, where they were brought to the hammer with a quantity of other goods of a similar description, and disposed of by a forced sale at so enormous a sacrifice, that the Plaintiff would have been much more mercifully dealt with had the Defendant at once deducted 50 per cent. from the 8000*l.*, the amount of the proposed loan, and taken a security for the full sum. Where, as in the present case, the tradesman must know that the sale effected in his shop is only nominal, and that the goods are purchased, not for the purposes of trade, or for use and enjoyment, but to be instantly resold, in a very different market, merely to raise a sum of money, equity relieves against such colourable sale: it treats the transaction as a loan having an usurious tendency, and as a catching bargain; and, therefore, in administering relief, it allows the vendor no more than the sum realised by the sale in the market to which he knew the property was destined: *Waller v. Dalt* (a), *Barker v. Vansommer*. (b)

The Plaintiff was an expectant heir; and with reference to his title to relief in that character, it is perfectly immaterial whether he was of mature years, or only just turned

(a) 1 *Ch. Ca.* 276. *S. C.* 1 *Dick.* 8.

(b) 1 *Bro. C. C.* 149.

turned of twenty-one; *Wiseman v. Beake*. (a) Now, although an expectant heir may mortgage his expectancies for a *bonâ fide* advance of money, he cannot borrow money in the shape of goods, and then give a mortgage on his reversionary property for the price. A sale by an expectant heir of his reversion, out and out, at an under value, cannot be supported: *Davis v. Duke of Marlborough*. (b) A mortgage is a partial sale, and may operate as a total alienation; it must, therefore, be governed by the same principles. This is simply an attempt to evade the rule, and to secure to the Defendant 30 or 40 per cent. beyond the principal which he actually parted with. Mr. *Hamlet* was well aware that the Plaintiff was a young unmarried man of extravagant habits, and that he was not living under his father's control; he knew, too, that, while the negotiation was in progress, the Plaintiff, under the pressure of necessity, had been forced to dispose of the whole of his annuity, and was, therefore, entirely destitute of any present means of subsistence. The transaction originated in a proposal for a loan of 5000*l.* in cash, and when that proposal was rejected, the treaty proceeded on the footing of an advance of goods, and the increase in the nominal amount was made in the delusive hope that the additional value of the goods taken might cover any loss upon the re-sale, so that 5000*l.* in money might still be realised. The produce to the Plaintiff, however, was barely 3000*l.* No allowance was made to him for ready money, although the price was to bear interest from the day of the alleged sale.

As the transaction could not bear the light, every artifice was resorted to for the purpose of disguising its real character. The mortgage describes the Defendant,

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(a) 2 *Fern.* 121.

(b) 2 *Swan.* 108.: see particularly p. 159. and the note, where

Mr. *Swanston* has collected all the authorities.

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not as a jeweller in *Prince's Street*, but as an Esquire of *Cavendish Square*; it states, not a dealing for goods, but a debt from the Plaintiff to the Defendant of 8000*l.*; it makes the Plaintiff, in the body of the instrument, acknowledge the receipt of the money; and a receipt is also indorsed on it and signed by the Plaintiff, which, contrary to the truth, represents the money as being then paid down.

The utmost advantage was taken of the Plaintiff's distresses, not only by the substitution of jewellery for money, and by the retention of the goods till the demand of the Defendant's attorney for his costs and commission had been satisfied, but also by the oppressive nature of the securities. Powers of leasing and selling the Plaintiff's reversion in the family estates, in default of payment of even half a year's interest; policies of insurance for 8000*l.*; warrants of attorney for entering up judgments in *England* and *Ireland*; a judgment actually entered up in *Ireland*; a promissory note for 8000*l.*, payable on demand, although by the deed three years' credit was given—all sufficiently attest the grinding, rapacious character of the transaction, and the abject and miserable state of thralldom to which the Plaintiff's necessities had reduced him. Against such a transaction, carried on and completed under such circumstances, surely it is not too much to ask a court of equity to relieve.

Even supposing that the Plaintiff's father (which, however, is not the fact) had been apprised of the true nature of the dealing, that would be no reason why all relief should be denied to the Plaintiff. The father's knowledge cannot destroy the equity of the son. Where the dealing takes place behind the back of the father, the presumption is perhaps more unfavourable to the lender, and an additional reason may exist why, on the ground of public policy, the Court should interpose; but the equity

equity unquestionably belongs to the heir, for whose protection it has been established, and who, in one view indeed, might be peculiarly exposed to fraud and oppression, were the person in actual possession of the estate a concurring or colluding party in the transaction by which the reversion was encumbered. Assuming that Lord *Lorton* was desirous to acquire a power over his son's reversionary estate; and that, therefore, he privately encouraged the Defendant in furnishing the goods on a mortgage of that estate in order afterwards to obtain an assignment of the mortgage, the Plaintiff knew nothing of his father's views or interference; and such interference cannot defeat his own right to be relieved against the imposition and oppression of which he has been made the victim. In point of fact, Lord *Lorton* never did know that goods, and not money, were to be the consideration for the securities; and when the whole transaction was disclosed, his offer of assistance to his son was only made upon condition that the Defendant would take back the goods; and that Mr. *Hamlet* refused to do.

The sale of the goods by the Plaintiff, however it may modify the remedy to be given, cannot deprive him of his title to relief. Notwithstanding the sale, the Court is still able to administer a fair and satisfactory measure of relief; for the prime cost and the sale price, (the latter including the manufacturer's and shop profit of the goods,) and also the value upon a sale by auction, and the charges attending such a sale, are all distinctly in evidence. The Defendant himself rendered the sale unavoidable, by refusing to receive back the goods and rescind the contract. There are no circumstances to warrant the conclusion, that the pressure of the Plaintiff's necessities ceased from the time when he made the proposal to return the goods. So far from it, the evidence proves that the Plaintiff continued

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wholly destitute of any present income until *December* 1829; and, further, that the offer of assistance from his friends to enable him to redeem the goods was conditional, and depended on the Defendant acceding to the proposal to take them back. The Defendant's refusal to comply left the Plaintiff no alternative but to sell. And if the qualified offer, made by Lord *Lorton* and rejected, is to deprive the Plaintiff of his equitable title to relief, parents will in future be deterred from lending assistance, in like cases, to their sons, lest, in the event of its proving ineffectual, their interference be used as an argument for upholding the very transaction which it was their object to avoid.

Mr. *Pepys*, Mr. *Knight*, and Mr. *Stuart*, for the Defendant.

The contract sought to be impeached was perfectly fair and honest; the Plaintiff entered into it with his eyes open, and under the advice and assistance of skilful professional men; he was quite competent, both by his years and his knowledge of the world, to engage in such a transaction, and having once knowingly and deliberately given his consent to it, he cannot now be permitted to repudiate it.

His father, Lord *Lorton*, moreover, who was tenant for life in possession of the very estates on which the securities were to be given, was privy to the whole negotiation, and thoroughly acquainted with its nature. The negotiation was, in fact, communicated to his Lordship by the express desire of the Defendant, who, until it had received his Lordship's sanction, refused to allow the treaty to proceed. These are circumstances which essentially distinguish this from every case where relief has been administered to expectant heirs in respect of their dealings with reversionary interests, and which would render the interposition of the Court in favour of

of the Plaintiff the very reverse of equitable or just. In no one of the numerous authorities on this head has the parent, or other person standing in a similar relation and enjoying the estate in possession, been, as here, a concurring or colluding party with the reversioner who seeks to be relieved against the consequences of his own acts; acts originating in the pressure of extreme distress, and in general studiously concealed from the knowledge of the person in present possession. The reasons of public policy which have led courts of equity, from a very early period, to interpose for the protection of expectant heirs in their transactions with money lenders, have no application in the present instance. The encouragement afforded by such transactions to the improvidence of youth, the destruction of parental influence and control, the unfair advantage which the lender may take of the distress and inexperience of the borrower—these, and similar considerations, never can arise where the person in actual possession of the property, the reversionary interest in which is the subject of the dealing, stands in *loco parentis* to the reversioner, and is himself privy to the transaction, and does not disapprove of it.

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The evidence shews, beyond the possibility of contradiction, that the prices charged for the different articles were the ordinary shop prices, such as were charged to other customers, and that the goods were freely selected by the Plaintiff and his agent at their own discretion. Upon this point the testimony of the Plaintiff's witness and agent, *Ford*, is distinctly contradicted by several of the Defendant's shopmen, who positively swear that no restriction whatever was placed on the purchaser and his agent with respect either to the nature or the prices of the goods to be taken, but that they were left at perfect liberty to select such articles as they pleased; and further, that while they

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were occupied in the selection, the Defendant, although he occasionally passed through the shop, in no way attempted to interfere with them.

It has never yet been decided, and the Court will not now decide, that where a tradesman sells shop goods, knowing them to be purchased solely with a view to an immediate resale for the purpose of raising money, the bargain will be set aside in equity, provided the prices charged are the ordinary and reasonable prices; far less is it the rule that such a transaction will be avoided on the terms of the purchaser paying over to the tradesman the money realized upon the resale. *Barker v. Vansommer* depended upon a totally different principle; the circumstances of the dealing, in that case, having caused the Court to regard it as a mere cloak for an usurious loan.

The Plaintiff, by his subsequent conduct in pledging the goods with *Robins*, in permitting them to be sold off by auction at a forced sale, in himself becoming the purchaser of some of them at the auction, and in suffering his former suit in this Court to be dismissed for want of prosecution, has rendered it impossible that matters should ever be restored to their original situation, and has wholly precluded himself, therefore, even supposing he had any equity at first, from now asserting a title to equitable relief.

The *Attorney-General*, in reply.

Jan. 21.

The LORD CHANCELLOR.

If the question which was before the Vice-Chancellor, and afterwards upon appeal in this Court in 1831, on the motion for the injunction, be now reconsidered,
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with the additional evidence derived from the depositions in the cause, it will still appear that the injunction was rightly granted upon the facts then disclosed, and that the case, in several material respects, stands at the hearing in a different position. Both his Honor and myself then considered that there was no proof of Lord *Lorton's* privity to the transaction; that the balance of probability was against Mr. *Hamlet* having made any effectual communication to his Lordship, or those acting on his behalf; and, that as the proceedings on the bill first filed by Mr. *King*, that of 1829, could not be effectually prosecuted in consequence of his distressed circumstances, his abandoning the suit, instead of obtaining back the goods from Mr. *Robins*, and keeping them till he should, by means of the suit, compel Mr. *Hamlet* to receive them, was sufficiently accounted for.

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All these things stand very differently now upon the evidence; and it may be added, that there is also some addition to the proof of adequate value. Upon this last point, however, I place the less reliance, because the other grounds appear sufficient to dispose of the question.

Two propositions I take to be incontestable as applicable to the doctrines of this Court upon the subject of an expectant heir dealing with his expectancy, and as governing more especially the present question. First, that the extraordinary protection given in the general case must be withdrawn, if it shall appear that the transaction was known to the father or other person standing in *loco parentis*—the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession—even although such parent or other person took no active part in the negotiation, provided the

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transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it so as to alter the situation of the other party, or his property; at least, that if he does so, the proof lies upon him of shewing that he did so under the continuing pressure of the same distress which gave rise to the original dealing. Still more fatal to his claim of relief will it be, if the father, or person in *loco parentis* shall be found to have concurred in this adoption of the repudiated contract. Either of these propositions would be decisive of the present question, if they are well founded in law, and if the facts allow of their application to it. I shall examine each of them in both respects.

The whole doctrine with respect to an expectant heir, assumes that the one party is defenceless, and exposed, unprotected, to the demands of the other, under the pressure of necessity. It would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings, and did nothing to prevent them. The parent might thus lie by and suffer his son to obtain the assistance which he ought himself to have rendered; and then only stand forward to aid him in rescinding engagements which he had allowed him to make and to profit by. If all the cases be examined from the time of Lord *Nottingham* downwards, no trace will be found in any one of them of the father's or other ancestor's privity: on the contrary, wherever the subject is touched upon, his ignorance is always assumed as part of the case; and its being so seldom mentioned either way shews clearly that the privity of the father or ancestor never was contemplated. It is, however, several times adverted

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to in a manner demonstrative of the principle. In *Colt v. Gibbons* (a), the ground of this whole equity is said to be the policy of the law to prevent the heir being seduced from a dependance upon the ancestor, who probably would have relieved him. In the same spirit Lord Cowper, in *Twisleton v. Griffith* (b), had before stated as one effect of the law, its tendency, by cutting off relief at the hands of strangers, to make the heir disclose his difficulties at home. So in *The Earl of Chesterfield v. Janssen* (c), Mr. Justice Burnett treats such transactions as things done behind the father's back, and, as it were, a fraud upon him; a view of the subject also adopted by Lord Hardwicke, in the same case. (d) It is as well to mention these cases, because there has been no decision upon the point; but it is quite a clear one, and only new because the facts never afforded a case for decision, the proposition having, apparently, never been questioned.

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It is now to be considered what evidence there is of Lord Lorton having been conusant of the transaction in question; and here the proof lies upon the Defendant. He must satisfy the Court that there was knowledge, but he is not bound to give direct and positive evidence. In this, as in all other cases, he may prove the fact by circumstances, which make out a case of such high probability that the Court cannot avoid believing and acting upon it. Moreover, he needs not prove that the knowledge extended to all particulars; for, if the father is clearly shewn to have known that there was such an improvident dealing on foot — a dealing which, from the nature of the thing, and the situation of the party, must needs be improvident — and did not inquire, I shall hold that his ignorance of some of the particulars, which he

(a) 5 P. Wms. 290.

(c) 1 Atk. 339.

(b) 1 P. Wms. 310.

(d) 1 Atk. 353, 354.

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he might have learned, had he taken due pains, goes for nothing. At the very least, much slighter evidence will be sufficient, in this case, to fix him with a knowledge of the whole, than where he was not proved or admitted to have been at all aware of what was going on.

It appears not merely from the answer of the Defendant, but from the evidence in the cause, that Mr. *Hamlet* communicated, through his agent Mr. *Newland*, to persons, whom he believed to be Lord *Lorton's* agents, the whole particulars of the transaction. This, however, goes for very little, except as shewing that he acted with good faith and is entitled to credit, when he represents that he refused to engage in the dealing without the father's knowledge and consent. But the evidence goes much farther. Mr. *Anthony Lefroy*, who is Lord *Lorton's* son-in-law, and the brother-in-law of the Plaintiff, swears that he went to Mr. *Newland*, at the request, and on the behalf of Lord *Lorton*. Mr. *Newland* swears to having distinctly told him the nature of the loan, and called his attention to the great loss which would be sustained by a resale of the goods; and he adds, that Mr. *Anthony Lefroy* said, "never mind the sacrifice, so that the estate is saved." Now, this is uncontradicted; for Mr. *Anthony Lefroy*, who swears that no such communication was ever made to him by *Newland*, only speaks "to the best of his now recollection." It would be too much to suppose that one of these witnesses had perjured himself because the other did not recollect the communication, and because it may appear improbable that he should have forgotten such a disclosure, upon which he had made such a remark. It must, therefore, I think, be taken to be proved that a near connection of Lord *Lorton*, sent by him to attend a meeting upon this business on his behalf, was informed by Mr. *Hamlet's* agent of the particulars of the transaction; and this is now before the Court much more
plainly

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plainly than it was before, both because the observation made by Mr. *Anthony Lefroy* is now, for the first time, in evidence, and also because the important circumstance is now first disclosed, that he attended on the part of Lord *Lorton*, and at his desire.

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Now, although I consider this as a fact of considerable weight, yet it might, by itself, be insufficient to bring the case within the principle; and it would, besides, be open to the remark that *Newland* did not tell Serjt. *Lefroy*, although he was the person principally sent to confer with him, was the experienced man of business, and was by at the time reading the draft. But there is another circumstance in the cause of great moment. Lord *Lorton* is examined; and he does not give an absolute and unqualified denial of all knowledge of the loan being in goods. He only swears, in his deposition, to his ignorance, before the execution of the mortgage, that goods were in any part the consideration of that mortgage; and also that, to the best of his recollection, "he knew nothing respecting the mortgage, or its existence, before its execution." Upon which the remark is most obvious, that if he did not, at that time, know of the existence of a mortgage, he could not, by possibility, have known that goods were part of its consideration; and that, therefore, this negative testimony amounts to nothing, and is quite consistent with his knowing that there was a negotiation on foot for a loan in goods; nay, it is consistent with Mr. *Anthony Lefroy* having repeated to him the conversation with Mr. *Newland*, which the former only says he did not repeat, "so far as he recollects." It may be further noted, that the interrogatory to Lord *Lorton* is framed in such a way as to obtain from him a restricted answer, confining him to a negation of knowledge, connected with the mortgage.

This

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This remark upon Lord *Lorton's* deposition lays the foundation for another upon the omission to call *Ferrall*, —a circumstance which, but for the defect of that deposition, I should have been less disposed to press. *Ferrall*, according to Lord *Lorton's* account, had volunteered his information that Mr. *King* “was in the hands of sharpers.” Upon this his Lordship saw him repeatedly, and learned from him that a transaction was then going on with Mr. *Hamlet*, for the purpose of raising money by *post obit*. Upon this information his Lordship acted, sending the *Lefroys* to see *Newland*; and himself having an interview with *Newland*, in consequence of what *Ferrall* had told him. Which party ought to have called *Ferrall*? Clearly not the Defendant; for although the affidavits on the motion gave no warning of the great hostility of his language towards Mr. *Hamlet* and his agents, yet they sufficiently shewed that he had been acting as an informer against them; and as to his being in league with the Defendant, because *Newland* says he had known him before, I take that to be a refinement; for *Newland* also swears most positively, that he came to him on this occasion from *Burt*, to ask about a loan for a client of *Burt*; that is, for Mr. *King*, who then employed *Burt*. I do not consider, therefore, that any observation whatever arises upon the fact of the Defendant not having examined *Ferrall*.

So, upon the former occasion, I did not consider that the Plaintiff could be made answerable for not producing an affidavit from him, because he had no means of compelling him to make one. But now, when he might have produced him, no explanation is given of his absence. If, indeed, *Ferrall* was not prepared to deny the account given by *Newland* of what he had said touching Lord *Lorton's* knowledge of and assent to the whole transaction, his not being produced is very easily under-

understood; and as that was also stated in *Newland's* affidavit, it seems strange that those concerned for the Plaintiff did not inquire whether or not *Ferrall* would, if examined, contradict it. With this observation I leave the subject of *Ferrall* not being examined, by no means intending to treat him as the witness of the Plaintiff, or as a person whom the Plaintiff was bound to call; still less as the agent of the Plaintiff, or Lord *Lorton*, but as Lord *Lorton's* informant, on whose suggestions he had acted, and of whose representations to *Newland*, as well as of the importance of contradicting them, they were fully aware.

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But when the case stands thus as to Lord *Lorton's* alleged knowledge of the particular nature and details of the transaction, the loan by way of goods, it becomes most material to recollect that it is clearly proved (indeed Lord *Lorton* has distinctly admitted) that he knew all the while the general nature of the dealing—knew that his son was dealing upon his expectancy. Even had the case stopped here, it might be contended that there is no instance of relief, where only that degree of knowledge was brought home to the father. Lord *Lorton* is aware of what his son is about; knows that he is mortgaging his reversion in the estates of which he is himself in possession as tenant for life, acts upon that knowledge, sends his professional adviser and son-in-law to treat for an assignment to himself of that very security which he is apprised is about to be given over that very reversion; and in consequence of the unfortunate estrangement which appears then to have kept them apart, he has no communication with his son on the subject. I will not say that this knowledge of itself, and in these circumstances, is sufficient to preclude the interference of the Court, but there is not a similar case as far as I know in which the Court has interposed; and assuredly
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this knowledge was quite enough to call for further enquiry into all the particulars, which the persons he was put in communication with could have told him, as they swear they told his son-in-law; nay, which his son, the Plaintiff, might have told him through a third person, through the son-in-law, the solicitor, or some other by whose intervention the inquiry could have been conducted. Taking the whole circumstances together, I cannot say that the evidence now before the Court has failed to fix Lord *Lorton* with the knowledge of the loan, and the manner in which the money or rather the money's worth was advanced; and I therefore think that the case comes within the first of the two propositions which were stated.

That the second of these propositions is undeniable in law, and is applicable to the facts of the case, appears equally clear. The whole ground of the doctrine is the pressure upon the heir, or the distress of the party dealing with his expectancies. While he continues under that pressure, the law (as Lord *Thurlow* said in *Gwynne v. Heaton* (a)), treats him as an infant. But the infancy is determined when the pressure is removed. The protection which Sir *William Grant* well describes in *Peacock v. Evans* (b), as approaching nearly to incapacity of contracting, must cease when the exigency of the case is at an end. When the expectant heir has himself thrown off the trammels which necessity had imposed on him, or rather had induced him to fetter himself withal, and has placed himself in an adverse attitude towards the other party of whom he had become really independent, he must no longer be treated differently from other persons; from the rule to which all are subject he cannot be exempt, the rule which forbids
a party

(a) 1 *Bro. C. C.* 1.(b) 16 *Ves.* 512.

a party to repudiate a dealing of which he voluntarily and freely is availing himself. Last of all shall he be permitted to use, for his own benefit, or which is the same thing, to make away with, or in any manner place out of his reach, for his present benefit, the property of another; and then to repudiate the contract by which that property came into his possession. To hold that he was entitled to do this, after the pressure of his circumstances had been removed, and merely because he owed the possession originally to the pressure of former difficulties, would be an extravagant stretch of the doctrines of this Court. Let us then look to the facts of the case, and see whether the Plaintiff was in circumstances of continuing pressure at the time when he placed the Defendant's goods beyond his reach. It must plainly be a very strong case to justify the Court in holding, that after he gave the Defendant notice to take back the goods he had a right to sell them; and now has a right to pay, not the price at which he took them, but that which they fetched at his own sale of them. Still less can this be allowed, if the father shall appear to have, before that time, become a party to the proceeding.

Upon this part of the case some important evidence is now supplied, which was not in the case before. It appears that Mr. *Bridges* was Lord *Lorton's* solicitor, at least as early as the years 1829 and 1830; that, in *January* 1829, he was employed by both Lord *Lorton* and the Plaintiff, but it plainly appears that he was principally employed by the father, to make an application to Mr. *Hamlet* to take back his goods, and deliver up the securities; and Mr. *Bridges* distinctly swears, that if Mr. *Hamlet* would have done so, "he believes that Lord *Lorton* would have enabled his son to make good the offer," that is, return the goods, which, of course, could only have been effected by satisfying Mr.

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Robins's lien for 2500*l.* advanced upon them. Can it then be said that the pressure was continued upon Mr. *King*? Is it not clear that his father had come to his rescue, and that he was in a condition, with such assistance, to have returned Mr. *Hamlet's* property? But, upon the latter refusing, a bill was filed, proceeding upon the footing of the offer, that is to have the securities given up on re-delivery of the goods. Then the goods should have been kept forthcoming with a view to this suit; and the course for Mr. *King* to have taken, now that he had his father's assistance, was to repay Mr. *Robins's* advances, which his Lordship was ready to do had Mr. *Hamlet* been willing to receive the goods, and to keep possession of those goods till the suit which he, or at any rate his son in concert with himself, had commenced should be determined.

Instead of this, however, they suffer Mr. *Robins* to sell the goods: in other words, they take the benefit of the loan of goods obtained from Mr. *Hamlet*, and which had enabled Mr. *King* to effect a loan of money with Mr. *Robins*, and they prefer the accommodation of continuing that loan from Mr. *Robins* to paying it off, and thereby keeping Mr. *Hamlet's* goods ready to deliver as soon as they should prove their title to be relieved against that transaction by means of which the goods had been obtained. It is true that Mr. *Bridges* applied to Mr. *Robins*, by Lord *Lorton's* desire, after the first bill was filed, to postpone the sale for a short time, in the hope that Mr. *Hamlet* might be induced to make an arrangement for taking the goods back. But he applied in vain. And why? The reason is not given; but it is as plain as if it were stated in so many words: the application was not accompanied with a tender of the money which Mr. *Robins* had advanced. And why was it not? That
reason

reason is equally plain, though it too is not given: it was because the parties preferred letting the sale take place to repaying the money; unless by means of such a repayment they could make sure of getting Mr. *Hamlet* to give up the securities and take back his plate and trinkets; in other words, they deemed it more convenient to continue the accommodation of the loan from Mr. *Robins*, which the goods had enabled them to negotiate, than to repay that loan and have Mr. *Hamlet's* goods to re-deliver when this Court should decide that he must take them. They had a right to do so; but having elected to use that right, it followed that their first bill was dismissed; and it equally follows that they never can reconstruct their whole case to make it suit the extraordinary position in which they have voluntarily placed it.

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It is by their voluntarily departing with those goods, that is, under no pressure whatever, using them to continue a loan which the possession of the goods had at first enabled them to contract, instead of paying it off, that they are not now in a situation to require that the transaction shall be rescinded, and each party placed in his former predicament; or to ask any thing of the Court but a restoration of what they gave Mr. *Hamlet* in return for giving up to him, not what they got from him, but what his goods fetched at their own sale, retaining all the accommodation they had from Mr. *Robins* by the use of them. To countenance this demand would be neither law, nor any thing like law; neither equity, nor any thing like equity. The circumstance of the balance which remained after the sale (528*l.* and a fraction) being paid over to Mr. *Bridges*, and carried to Lord *Lorton's* account, is of no great consequence. It only mixes Lord *Lorton* somewhat more with the proceedings in 1829. Mr. *Bridges* states that his Lordship in reality received

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 v.
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received none of it, as it went to pay debts of his son for which his Lordship was not answerable. Doubtless, however, it was so applied with his permission, after having been carried to his credit; and, therefore, he received and used the balance, however kind and praiseworthy may have been the purpose to which he devoted it.

I have said nothing as to the evidence of value, which is in some respects stronger than upon the motion, because little appears to turn upon that. There never has been any reasonable doubt that the price put upon the goods was that which all persons were charged in-differently who purchased at the Defendant's shop, and that the Defendant was lending what to him would have been worth 8000*l.* to sell, and that the benefit he gained by the transaction was the certain market for all this amount of wares, and avoiding the risk of some at least standing over till their price fell. But certainly, if it was material, the proof of the prices being fairly charged in the valuation at which the advance was made has been strengthened since the motion, by the Plaintiff producing no evidence against that of the Defendant's shopmen and other valuers, and by the circumstance of Mr. King himself having bought some 30*l.* or 40*l.* worth of them at the sale, which, consequently, he could have had examined by his own valuers, and shewn to be worth less than they were charged to him by Mr. Hamlet's ticketed prices, if such had been the case.

I shall say a word upon *Barker v. Vansommer* (a), a strong case, one should perhaps say, if it were merely upon the subject of expectant heir. If it had turned upon that, it would have been clearly distinguishable from

(a) 1 Bro. C. C. 149.

from this case, by having neither of the two peculiarities which I have been considering. But the decision, in that case, plainly did not at all depend upon Mr. *Barker* being an expectant heir; and he could not be said to be dealing with his expectancy. His being a young man in want of money, is only adverted to as one circumstance going to make out the case of loan, and to negative the contention that it was a sale of goods. But the whole turned upon the transaction being a loan at usurious interest, the transfer of goods being a shift or cloak for usury. Not a word is said, in the course of the argument, of dealing with reversions, nor is a single case cited of the many belonging to that head of relief. Upon the whole of the circumstances, the Court thought it was a loan at usurious interest, and treated it as such, ordering the securities to be delivered up on payment of what they fetched, after directing an inquiry as to the circumstances of the sale.

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 v.
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The present case has not been put upon usury, and it is plain it cannot stand merely upon that ground; for though there may be loan, there is not sufficient proof of the high rate of interest. A person, not in the situation of expectant heir, may, with his eyes open, as here, obtain a quantity of goods from another, provided he takes them at the shop price, as every other person, as all ordinary customers, would do. His object in obtaining them being to sell again, and the tradesman knowing that to be his object, are not circumstances which can of themselves make the transaction usury.

These are questions of fact, and any circumstances altered or added may change the complexion of the transaction. That the party takes the goods in a shop by choice among the goods exposed to all customers, and at shop prices, is a very material fact, and greatly

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differs this from a private bargain on the foot of a value imposed on the goods by the seller or lender. It tends to shew that, whatever use the borrower or buyer is to make of the goods, and whatever loss he may sustain by the resale which such use requires him to make, the lender or seller gains only the benefit of a market for part of his merchandise, which he might not otherwise be able, so easily, and in so large a lot, to dispose of. It is not necessary to decide that these particulars, in every case, and in all other circumstances, will prevent the transaction from being held a cover for usury, as the purchase of *Mr. Barker* was deemed to be. It is enough to say, that they differ this case from his. Each case of this sort turns on its own circumstances. As a rule, it can only be said that all such dealings are in themselves suspicious; and that whoever engages in them runs risks not incident to ordinary transactions in trade, and must lay his account with having the whole circumstances sifted in a way, and by a process of scrutiny, from which other transactions are exempt. The transaction of *Mr. Hamlet* has been so sifted, and I think it has stood the test.

For the reasons which, in consideration of the importance of the question, and the apparent, but not real discrepancy between the present and former decisions, I have given at length, I am of opinion that the bill must be dismissed. (a)

(a) This decision is now under appeal in the House of Lords.

1835.

SANDYS v. LONG.*

1835.
March 11.

THE Plaintiff described himself, in his bill, as of *Cheltenham*. On behalf of the Defendant a motion was made before the Vice-Chancellor, that the Plaintiff should give security for costs, on an affidavit that the Plaintiff was not residing at *Cheltenham*, and had not resided there for some months previous to the filing of the bill. *Collinson v. Cookson* (a), *James v. Tilladam* (b), and *Redesdale on Pleading* (c), were referred to. His Honor granted the motion.

Where a Defendant upon his bill misstates his place of residence, the Court will order him to give security for costs.

Mr. Cooper, in now moving to discharge the order of the Vice-Chancellor, while he fully admitted that the rule laid down by Lord *Redesdale* was correctly stated, observed, that the two cases in the Exchequer were unopposed, and that the practice was different in Chancery, and similar to the old rule at law, where the practice was to plead in abatement, and that the objection ought, in Chancery, to be made by demurrer or plea; and he cited *Rowley v. Eccles*. (d)

Mr. *Monro*, *contra*.

As the Court, if a plaintiff had stated himself to be living abroad, would oblige him to give security for costs, so, by analogy, it would do so when he misdescribed himself. In *Rowley v. Eccles* the point was not raised.

The

(a) 2 Fowl. Exch. Prac. 511. (c) p. 42. 4th ed.
(b) 2 Fowl. Exch. Prac. 311. (d) 1 Sim. & Stu. 511.
S. C. 2 Anst. 552.

* *Ex relatione* Mr. *Monro*.

1895.

SANDYS
v.
LONG.

*The LORD CHANCELLOR.**

One reason assigned by Lord *Redesdale* for requiring a plaintiff to state the place of his abode, is, that the defendant may know where to apply for costs.' A Defendant could not demur or plead without incurring considerable additional expense, which it would be unreasonable to impose on him. There does not appear to have been any decision in this court on the point; but two cases in the Exchequer have been cited, in which that Court adopted the practice now contended for by the Defendant. It is said that in those cases, the orders were not opposed, but that security was given on the first occasion; and that, on the second, the former decision was cited, and the Court, without having any opportunity of reconsidering the point, adhered to its original determination. That practice has been followed by the Vice-Chancellor in the present case. Before I overrule his Honor's decision, the Court ought to be satisfied that it is erroneous; no error, however, has been pointed out to me, and I think that, if the case had been brought before me in the first instance, I should have come to the same conclusion at which his Honor arrived.

I must therefore dismiss this application; but, as it is a new point, without costs.

* Lord *Lyndhurst*.

1833.

STOCKEN v. STOCKEN.

1833.
Dec. 17, 20, 21.

THIS case is reported, upon the hearing before the Vice-Chancellor, in 4 *Simons*, 152. By a typographical error in that report, the word "charges" has been substituted for "changes" in the proviso reserving to Mr. *Bettesworth* a power of making a different disposition by his will.

The Plaintiffs appealed from his Honor's decree.

Mr. *Spence* and Mr. *Goodeve*, in support of the appeal.

Mr. *Pepys* and Mr. *Koe*, *contrà*.

The LORD CHANCELLOR observed, that the objections made to his Honor's decree were of two kinds, some of them applicable to the substance of the decree, and others merely to its form. With respect to the latter, he felt no hesitation in saying that they were, in his opinion, untenable. Upon the other points, also, which went to the merits, the authority of *Mundy v. Earl Howe* (a) appeared to be decisive in favour of the decree; but, before finally giving judgment, he should take further time to look into and consider that case.

Dec. 21.

The case was mentioned several times afterwards, but no final judgment appears to have been pronounced on the appeal.

(a) 4 *Bro. C. C.* 224.

1834.

Rolls.

1834.

March 12.

MEACHER v. YOUNG.

If under a marriage contract, a fund has been settled upon trust for the children of the marriage, at twenty-one, with a proviso, that till their shares become payable, the interest shall be applied towards their maintenance; the father is entitled to receive such interest for that purpose, without reference to his own ability to maintain them.

UNDER the settlement made upon the marriage of *Edward Augustus Meacher* and *Sarah Rackstraw*, a sum of stock which was the property of the intended wife was transferred to trustees upon trust for the separate use of the wife for life, with remainder, after the death of the wife, to and among the children of the marriage equally, to be a vested interest in the case of sons at twenty-one, and in the case of daughters at twenty-one, or marriage; "and in the meantime, and until such shares should become payable, upon trust to pay and apply the clear yearly interest, dividends, and income to arise therefrom for and towards the maintenance and education of such child or children respectively, in proportion to their respective shares;" with remainder over to the husband for life, &c.

There was issue of the marriage one child only, the infant Plaintiff, in whose name, on the death of his mother, the present bill was filed by his next friend, to have the trusts of the settlement carried into effect.

Mr. Bickersteth, who appeared for the Plaintiff, submitted, that, with respect to the allowance for the infant's maintenance, there ought to be a reference to the Master to inquire whether the Defendant, the father of the infant, was of ability to maintain his child.

Mr. Pemberton and *Mr. Phillimore*, for the father, contended, that, upon the principle laid down in *Mundy v. Earl Howe* (a), a principle recognised by *Mr. Roper*

(a) 4 Bro. C. C. 224.; and see *Hosie v. Pratt*, 3 Ves. 750.

per (a), and recently acted upon by the Vice-Chancellor in *Stocken v. Stocken* (b), such a reference was unnecessary and improper. The allowance made for the maintenance of the issue was a stipulation in the marriage contract, and was to be treated, therefore, as part of the consideration for which the husband consented to give up his marital right over the fund, and become a party to the settlement. The case was the stronger, because the whole income was devoted to maintenance during the minority of the children, and no discretion as to the amount or mode of the application was vested in the trustee.

1884.
MEACHER
v.
YOUNG.

Mr. Wood, for the trustee.

The MASTER of the ROLLS said that this must be considered as a fund provided by the father, inasmuch as, but for the settlement, he would have taken it by virtue of his marital right. The settlement, however, altogether deprived him of any personal benefit (and so it was intended) so long as there was living issue of the marriage; but the proviso, that the issue should have maintenance out of the trust-fund equally formed an integral part of the contract, and was one of the considerations which had moved the husband to join as a party in the settlement. He therefore had a right to have it strictly enforced in his own favour, without reference to the question of his ability.

By the decree it was declared that the Defendant *E. A. Meacher* was entitled to be paid so much of the dividends of the trust fund as was proper to be allowed for the maintenance and education of the infant Plaintiff for the time past, and for the time to come; and it was referred

(a) *Rep. on Leg.* vol. ii. p. 270. (b) 4 *Sim.* 152. and p. 489.
3d ed. *supra.*

1834.

 MZAQUEN.
 v.
 YOUNG.

referred to the Master to consider and state what would be a proper allowance for such maintenance and education since the death of the infant's mother, as also in future during his minority, &c.

Reg. Lib. 1833. B. fol. 838.

ROLLS.
 1833.
 Dec. 16.

ACTON v. WOODGATE.

If property be conveyed by a debtor in trust for the benefit of creditors, who are neither parties nor privy to the deed, the deed merely operates as a power to the trustees to apply the property in payment of debts, and such power is revocable by the debtor.

Quare, Whether a communication by the trustees to the creditors of the fact of such a trust will not defeat the power of revocation by the debtor?

MAJOR HENRY WOODGATE being embarrassed in his circumstances, and indebted to a large amount to the Defendants, *William Woodgate* and *James Currie*, and to many other persons, did, by indentures of lease and release, dated the 28th and 29th of *October* 1831, convey certain real estates to the said *William Woodgate* and *James Currie*, their heirs and assigns, upon trust to sell the same, and out of the produce to pay the debts due to them, and all other debts then due from *Major Woodgate*.

At the time of the execution of this conveyance, *Major Woodgate* was indebted to several persons on *post obit* bonds, and also on annuity deeds; and a doubt afterwards arising whether the description in the trust-deed of debts then due from him might not extend, contrary to his intention, to the *post obit* bonds, and to future arrears of the annuities, he, by other indentures of lease and release, dated the 29th and 30th days of *August* 1833, made between himself of the first part, the former trustees of the second part, and certain creditors therein named of the third part, after reciting the former deed, and the doubts that had arisen with respect to the *post obit* bonds, and the arrears of annuities, directed that the trustees should apply the produce of the trust estates in payment of their own debts, and of all other debts

debts due from him, *Henry Woodgate*, at the time of the execution of the first conveyance, with the exception of the *post obit* bonds and subsequent arrears of annuities.

1833.

 ACTON
 v.
 WOODGATE.

The present bill was filed by a general creditor against the trustees and *Henry Woodgate*, to have carried into execution the trusts of the second conveyance; or of the first conveyance, if the Court should be of opinion that the trusts of the first conveyance could not be varied by the grantor. The Defendants, the trustees in the two conveyances, by their answer stated that *Major Woodgate* was then, and at the time of executing the first conveyance, indebted to certain persons, whom they named, on *post obit* bonds, and to certain other persons, whom they also named, on annuity deeds; and submitted to the Court whether such several persons ought or ought not to be made parties to the suit, in order to assert their claims under the first conveyance.

The first conveyance was not communicated to any creditor except the trustees; nor was any other creditor party or privy to it. The second conveyance was executed by several creditors, who were not privy to the first.

Mr. Pemberton and *Mr. Sidebottom*, for the Plaintiff.

It is admitted that a voluntary grant cannot be revoked, if the relation of *cestui que trust* and trustee is once established. The Court will not execute a mere voluntary agreement; but a deed, though voluntary, if the legal estate be effectually conveyed by it, and a trust declared, will be executed by the Court against the trustees and the author of the trust: *Colman v. Sarrel* (a), *Ellison v. Ellison* (b), *Pulvertoft v. Pulvertoft*. (c) But it may now be considered as settled by the authorities, that a trust deed for payment of creditors does
 not

(a) 1 Ves. jun. 50.

(b) 6 Ves. 656.

(c) 18 Ves. 84.

1838.
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 v.
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not establish the relation of *cestuis que trust* and trustees between the creditors, not parties to the deed, and the trustees; nor is the legal estate irrevocably conveyed by such a deed. A deed of this kind is considered as a mere deed of arrangement made by the grantor for his own convenience, and subject to revocation or alteration at his discretion. *Walkyn v. Coutts* (a) decided that the author of a trust-deed for the payment of creditors, to which no creditor was a party or privy, might vary the trusts by subsequent deeds as he thought fit. *Garrard v. Lord Lauderdale* (b) carried the principle of the decision in *Walkyn v. Coutts* much farther, for there the solicitor of the trustees and of the author of the deed actually sent a circular letter to the creditors, informing them of the nature of the trust-deed, and of its execution; but the Vice-Chancellor held that the creditors had no right, notwithstanding that circumstance, to enforce the deed against the representatives of the grantor, inasmuch as they had not, by signing and sealing, made themselves parties to the deed. An appeal was brought from the decision of the Vice-Chancellor, and his judgment was affirmed by Lord Brougham. In *Page v. Broom* (c), a question was raised similar to that now before the Court. A debtor had, by a deed-poll, directed the receiver of his estate to pay the interest of a particular mortgage; and it was held that, as the deed was executed without the privity of the mortgagees, and without consideration on their part, it was not binding on the author of it, and that the mortgagees were not necessary parties to the receiver's accounts. It is clear, therefore, upon all the recent authorities, that the creditors excluded by the provisions of the second conveyance are not necessary parties to the suit.

Mr.

(a) 5 Mer. 707. and 3 Sim. 14.
 (b) 5 Sim. 1.

(c) 4 Russ. 6.

Mr. *Tinney* and Mr. *Wigram*, for the Defendants, said the trustees had considered it incumbent upon them to submit the question to the Court; but they were equally interested with the Plaintiff in contending that the *post obit* bond and annuity creditors ought not to be made parties to the suit.

1838.

Acron
v.
Woodgate.

The MASTER of the ROLLS.

It is established by the authorities which have been referred to, that, if a debtor conveys property in trust for the benefit of his creditors to whom the conveyance is not communicated, and the creditors are not, in any manner, privy to the conveyance, the deed merely operates as a power to the trustees, which is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and, before any payment made by the agent, or communication by him to the creditors, had recalled the money so delivered.

In the case of *Garrard v. Lord Lauderdale*, it seems to have been considered that a communication by the trustees to creditors of the fact of such a trust would not defeat the power of revocation by the debtors. It appears to me, however, that this doctrine is questionable, because the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised. In the present case, no such communication was made; and the creditors by *post obit* bond, and the annuitants who were named in the answer of the trustees, are not, therefore, necessary parties to the suit.

The trusts of the second conveyance were decreed to be carried into execution.

1884.

ROLLS.
1834.

May 5.

A man unmarried cannot recall a voluntary trust deed, which he executes for the benefit of future children; nor can he relieve himself from a provision in the conveyance to the trustee, under which the income of the trust property is to be paid to him at the discretion of a third person.

PETRE v. ESPINASSE.

THE Plaintiff, *Philip William Petre*, having lived improvidently and contracted debts, retired from *England* to *Boulogne*, where he also contracted debts; and, for some time previously to the year 1829, he had been confined in the prison of that town, and supported by monthly allowances remitted to him by his brother, *George Petre*. In *March* 1829, *George Petre* died intestate; and the Plaintiff, as one of his next of kin, became entitled to one seventh part of his brother's personal estate.

By an indenture, dated the 4th of *May* 1829, and made between the Plaintiff, *Philip William Petre*, of the one part, and the Defendant, *Robert Espinasse*, who was the Plaintiff's brother-in-law, of the other part, reciting that the Plaintiff, having expended the whole of his patrimony, had, for a considerable time, been living chiefly on the bounty of his eldest brother, *George Petre*, who had died a bachelor, leaving *Henry Petre*, his eldest brother and heir at law, and that the Plaintiff was indebted to various persons, chiefly resident in *France*, and that he was then imprisoned at *Boulogne* for debt; and also reciting that it was uncertain whether *George Petre* had left a will, or died intestate, but it was thought probable, if a will should be found, that some legacy or bequest would be therein contained for the benefit of the Plaintiff; and if it should prove, as it was then imagined, that *George Petre* died intestate, then the Plaintiff would be entitled to a distributive share of his brother's personal estate; and further reciting, that, with a view to make some provision for the liquid-

liquidation of such of the Plaintiff's debts as were thereinafter mentioned, and to establish a fund for the future benefit of the Plaintiff and his children, in case he should marry and have any, the Plaintiff had determined to vest absolutely in the Defendant all such part of his late brother's estate as he might be entitled to, it was witnessed that the Plaintiff did assign to the Defendant, *Robert Espinasse*, his executors, administrators, and assigns, all his interest in the property of his late brother, *George Petre*, upon trust, if the Defendant, his executors, administrators, or assigns should, in his or their discretion, think fit, but not otherwise, upon the request in writing of the Plaintiff, and with the consent of *Henry Petre*, the eldest brother of the Plaintiff, to pay in full or in part all or any debt or debts then due and owing from the Plaintiff, and to lay out and invest in the name or names of the Defendant, his executors, &c. in government or real securities, so much of the gross monies as should remain after answering the purposes aforesaid, upon trust that the Defendant, his executors, &c., should, during the life of the Plaintiff, pay or apply for the benefit of the Plaintiff the interest of the trust funds or securities, or so much thereof as *Henry Petre* should consent to being so paid or applied, and so that the Plaintiff should not in any manner assign, charge, or incumber such interest before the same should actually become due; and upon further trust, that, if the Defendant, his executors, &c., should, with the consent of *Henry Petre*, but not otherwise, think fit, then to pay or apply any part of the capital of the said trust funds to or for the benefit of the Plaintiff, at any time or times during his life, and from and after the decease of the Plaintiff, it was thereby agreed and declared, that the Defendant, his executors, &c., should stand and be possessed of the said trust funds, or so much thereof as should not be applied or disposed

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PETRE
v.
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disposed of under the trusts thereinbefore declared, upon trust for all and every the children or child of the Plaintiff in manner therein mentioned; and, in default of children, then for the Plaintiff, his executors, administrators, or assigns; and the deed gave to the Plaintiff a power of revocation with the consent in writing of the Defendant, his executors, &c., and also with the consent of *Henry Petre*, and, in case *Henry Petre* should not be living, with the consent of other persons therein named.

The Defendant, who was a special pleader, having procured this deed to be prepared by a conveyancer, and engrossed, at the instance of the Plaintiff's relations, went over with it to *Boulogne*, where it was executed by the Defendant, after it had been read over, and its contents explained to him. The debts owing from the Plaintiff to creditors in *France* were discharged or compromised by the Defendant within four months from the execution of the deed, and the Plaintiff was thereupon liberated from prison.

The bill was filed by the Plaintiff in *August* 1833; it alleged that the Plaintiff had been induced to execute the deed when he was in prison, and without professional assistance; and it prayed that the deed might be delivered up to him that he might put an end to the trusts thereof, and that he might be declared absolutely entitled to the benefit of the trust funds.

Subsequently to the filing of the bill, the Plaintiff intermarried, at *Bruges*, with *Maria Theresa Aunoot*; and a child of the marriage was afterwards born, who was made a Defendant by a supplemental bill. The supplemental bill charged that, before the birth of the child, the Plaintiff had well and effectually revoked the trusts
of

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of the indenture of *May* 1829, by a letter written and sent to the Defendant by the Plaintiff's solicitor, requiring the Defendant to transfer the trust funds into the name of the Plaintiff.

1834.
Barnes:
v.
Rothmann.

Mr. Pemberton and *Mr. O. Auderdon*, for the Plaintiff.

The circumstances under which this deed was executed are sufficient to invalidate it, even without reference to the nature of the instrument. The Plaintiff was in prison; he was destitute of professional assistance; and he was induced to execute it upon a representation, which is imported into one of the recitals, and which is admitted to have been erroneous, namely, that it was a matter of uncertainty whether he was or was not absolutely entitled to a distributive share of his deceased brother's personal estate. A considerable period had elapsed since the death of the Plaintiff's brother; there was no doubt whatever that that brother had died intestate, and there was, consequently, no ground for treating as doubtful the Plaintiff's right to a seventh share of the intestate's estate, which he is made to dispose of by a deed prepared in another country, and without his privity or consent.

Supposing the Plaintiff, however, to have been fully cognisant of the contents of the instrument, and to have acquiesced in its provisions at the time when he executed it, it is a deed in its nature revocable, and the trusts of which he has, in fact, revoked. It is a deed of which the primary and only substantial object is to effect an arrangement for the payment of the Plaintiff's debts; and, if the deed went no further than the trust by which the grantor vests his property in a trustee upon trust to pay creditors, who are neither parties, nor privy to the deed, it is clear, upon the recent authorities, that such a deed may be altered or revoked by the grantor: *Wall-*
v. m

1834.
 {
 BAKER
 v.
 ESPINASSE.

Wynn v. Coutts (a), *Garrard v. Lord Lauderdale* (b), *Acton v. Woodgate*. (c) The only question is, whether the trust for the children would give an entirely new character to an instrument which, as to its primary purpose, is undoubtedly revocable. It will hardly be contended that the deed is liable to alteration or revocation of the trusts as to one part, and irrevocable as to another. The deed was substantially a deed of arrangement for the satisfaction of creditors who were no parties to it; and, if revoked, as it was, in fact, revoked by the Plaintiff, before any child came into *esse*, the subsequent birth of a child cannot deprive the Plaintiff of a right which the nature of the instrument reserved to him, and which he had in fact exercised by calling upon the Defendant to transfer the trust-funds into his name.

If the deed be not in its nature revocable, the restraint which it imposes upon the Plaintiff's enjoyment of the interest of the trust property is contrary to law, inasmuch as an attempt is made to deprive property of its incidents. Thus, a clause is introduced, by which it is provided that the Plaintiff shall not anticipate the interest of the trust fund, there being no gift over in case he shall contravene the provision; a clause which is clearly inoperative: *Graves v. Dolphin* (d), *Green v. Spicer* (e), *Piercy v. Roberts*. (g)

Mr. *Bickersteth* and Mr. *Wilbraham*, for the Defendant *Espinasse*.

The Defendant consented to become the trustee under this deed at the earnest solicitation of the nearest relations of the Plaintiff; and the Plaintiff's brother,
Henry

(a) 3 *Mer.* 707. and 3 *Sim.* 14.

(b) 3 *Sim.* 1.

(c) p. 492. *suprà*.

(d) 1 *Sim.* 66.

(e) 1 *Russ. & Mylne*, 395.

(g) 1 *Mylne & Keen*, 4.

Henry Petre, was, by the provisions of the deed, made a necessary consenting party, at the express desire of the Defendant, in order that the control to which the Plaintiff should be subjected in regard to the enjoyment and disposal of the trust-fund might not be exclusively exercised by the Defendant. It would be the greatest misfortune that could befall the Plaintiff, were he to succeed in the object of this bill, which is to set aside an instrument voluntarily executed by himself, for the purpose of securing himself and his family against the consequences of his own improvidence. The law of *England* has not, indeed, followed the *Roman* law by placing improvident persons under guardianship; but, if the law of this country be not itself active to prevent the consequences of improvidence, it does not prevent improvident persons from imposing salutary restraints upon themselves, and from placing under the control of others that property which, they are sensible, will, if left at their own disposal, be wasted and consumed.

1834.

Petre
 v.
Egerton.

There is not the least colour for the allegation in the bill, that an advantage was taken of the situation of the Plaintiff; and the only question is, whether the Plaintiff can come into this Court to set aside his own deed, a deed framed and executed for the most meritorious purposes, merely upon the ground that it was voluntary. If the property assigned to the trustee had been real estate, and the deed had consequently been void against a purchaser for valuable consideration, the Plaintiff himself could not come here to set it aside. This deed is plainly distinguishable from deeds vesting property in trustees for the purpose of facilitating the payment of debts; for the satisfaction of the Plaintiff's creditors was only one of the objects of the deed, and there is an express trust declared for the benefit of the children who might afterwards be

1834.


 PESTRE
 v.
 ESPINASSE.

born to the Plaintiff. Even if the deed had stopped short at the trust for the payment of creditors, the Plaintiff could not now succeed in an attempt to revoke or vary a trust which was carried into execution long before the filing of the bill. Still less can he be permitted to come into a Court of equity for the purpose of avoiding an express trust which he has declared for the benefit of his children: *Ellison v. Ellison* (a), *Pulvertoft v. Pulvertoft*. (b)

Mr. Flather, for the infant.

The MASTER of the ROLLS.

How far this trust deed might be considered as void against persons claiming under the Plaintiff for valuable consideration, is not now the subject of inquiry. It is plain that a person cannot himself recall a voluntary deed which he has executed for the benefit of his children; and I know no reason why, for the benefit of those children, he may not submit to the discretion of a third person the extent of the enjoyment of the income of his property. The bill, therefore, must be dismissed, and with costs.

(a) 6 *Ves.* 656.

(b) 18 *Ves.* 84.

1835.

BILL v. CURETON.

Rolls.
1835.
Feb. 21.
March 4

THE Plaintiff, *Mary Bill*, being possessed of a sum of 1666*l.* 13*s.* 4*d.* 3 per cent. consols, was prevailed upon to transfer the same into the names of the Defendants *Edward Cureton, Henry Peile, and Robert Barker*; and she executed an indenture, dated the 14th of *August* 1827, and made between herself of the one part, and the Defendants *Cureton, Peile, and Barker* of the other part, whereby it was declared and agreed that the Defendants should stand and be possessed of the sum of 1666*l.* 13*s.* 4*d.* 3 per cent. consolidated bank annuities, then standing in their names, and the dividends and income thereof, upon trust to pay the dividends and annual proceeds thereof unto *Mary Bill*, or otherwise fully authorise her to receive the same until she should be married; and after she should be married, in trust to pay the dividends and annual produce of the said bank annuities into the proper hands of *Mary Bill*, or into the hands of such person or persons as she should, by any note or writing under her hand, from time to time (but not by way of anticipation) appoint to receive the same during her life, to the intent that the same might be for her sole and separate use, and might not be subject to the control, disposition, or engagements of any person or persons with whom she might intermarry; and from and after the decease of *Mary Bill*, in case she should intermarry and leave a husband surviving her, in deed or will appoint; and in default of appointment, upon trust for her next of kin. The settlement is irrevocable.

In a bill filed by the settlor for the purpose of setting aside the settlement, the mortgagee of her interest under the settlement joined as a co-plaintiff. He can obtain no relief in such a suit.

1636.

 BILL
 v.
 CUNSTON.

in trust to pay to, or otherwise fully authorise and empower, such husband and his assignees to receive the dividends and annual proceeds of the said sum of 1666*l.* 13*s.* 4*d.* bank annuities for and during the term of his natural life, or until he should become a bankrupt; and from and after the decease of such husband, or from and after the time when he should become a bankrupt, in trust for all and every the child and children of the body of *Mary Bill* either by such husband or any future husband or husbands, equally to be divided between and amongst them, share and share alike, as tenants in common; and if there should be but one such child, then for such only child, and to be transferred and assigned to such child or children at the age of twenty-one if a son or sons, or upon marriage if a daughter or daughters, in manner therein mentioned; and upon further trust that the Defendants, and the survivors, &c. should, in the mean time, after the decease of the survivor of the Plaintiff *Mary Bill*, and any husband with whom she might thereafter intermarry, pay and apply all or a competent part of the dividends and annual proceeds of the said sum of 1666*l.* 13*s.* 4*d.* bank annuities for and towards the maintenance and education of the children or child of the marriage or marriages of *Mary Bill* with any husband or husbands; and in case there should be no child of the body of the Plaintiff *Mary Bill* by any husband with whom she should thereafter intermarry, then upon trust for such person or persons, and in such shares and proportions as *Mary Bill* should, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by her in the presence of two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of her last will and testament, to be signed by her in the presence of the like number of witnesses, direct, limit or appoint, give or bequeath

CASES IN CHANCERY.

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bequeath the same; and in default of such appointment, in trust for such person or persons who should be the next of kin of *Mary Bill* according to the statute of distributions.

1836.
Bill
v.
Cureton.

The Plaintiff, having become embarrassed in her circumstances, in consequence of having placed the stock out of her control, obtained from time to time advances of money from the Defendant *Cureton*, amounting in the whole to 175*l.*, to secure the payment of which she, by an indenture dated the 8th of *February* 1832, assigned, by way of mortgage, to *Cureton*, his executors, administrators, and assigns, all the interest and dividends thenceforth to accrue due in respect of the sum of 1666*l.* 13*s.* 4*d.* 3 per cent. consols, and all her estate and interest in the same.

Cureton afterwards advanced to the Plaintiff some further sums, and, for the purpose of reimbursing himself, he retained the whole of the dividends upon the stock until the Plaintiff's debt was reduced to 152*l.* 11*s.* In *June* 1833, *Alborough Henniker* paid off the debt due to *Cureton*, and advanced to the Plaintiff a further sum of 127*l.* 9*s.*, taking an assignment, by way of mortgage, from *Cureton* and the Plaintiff of all their right and interest in the dividends of the stock, to secure the repayment of the 280*l.* advanced by him, with interest at 5 per cent.

The bill was filed by *Mary Bill* and *Alborough Henniker* against the trustees of the deed of *August* 1827; it alleged that the Plaintiff, *Mary Bill*, executed that deed solely with the view of protecting herself against the importunities of relations, who were constantly soliciting her to make advances of money to them, and that she did not intend to preclude herself from calling for a re-transfer of the stock to herself, or

1855.

 Bill
 v.
 Cotton.

as she should appoint; and it further stated, that neither at the time of the execution of the trust deed, nor at any subsequent time, was there any marriage in contemplation between her and any other person. The bill prayed that the settlement might be declared voluntary and revocable, and that it might be delivered up to the Plaintiff, *Mary Bill*, to be cancelled; and that the Defendants might be decreed to transfer the stock into the joint names of the Plaintiffs, and that the amount of the principal and interest due to the Plaintiff *Henniker* might be raised and paid to him.

Mr. *Pemberton* and Mr. *Blunt*, for the Plaintiffs.

The question is, whether the voluntary deed by which, if it is to be held irrevocable, this lady has unfortunately deprived herself of the means of subsistence, is not analogous to those conveyances by which the grantor gives his property to trustees, upon trust to pay creditors who are not parties to the deed, and between whom and the grantees the relation of *cestuis que trust* and trustees is, consequently, not created. It is now settled that deeds of this description may be varied or revoked by the grantor; and even the express communication by the trustees to creditors of the execution of such a deed appears to be insufficient to clothe the creditors with the character of *cestuis que trust*, and to deprive the maker of the instrument of the right of altering or revoking it: *Walkwyn v. Coutts* (a), *Garrard v. Lord Lauderdale*. (b) In this case the settlement was not made in contemplation of marriage, nor has the Plaintiff contemplated marriage at any time subsequent to its execution. There is, consequently, no *cestui que trust* in existence; no husband or child who can claim under

(a) 3 *Mer.* 707. and 3 *Sim.* 14.

(b) 3 *Sim.* 1.

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under the deed; and as to next of kin, they cannot be ascertained during the life of the Plaintiff, and the ultimate trust in their favour is, by the provisions of the deed itself, liable to be defeated at any time by the exercise of the Plaintiff's power of appointment. The case, therefore, seems to fall within the authorities, by which it is held, that a voluntary trust made for the convenience of the grantor is revocable, unless there be some contract, direct or indirect, with a *cestui que trust* who is party or privy to the deed. Here there neither was nor could be a *cestui que trust*, party or privy to the deed. In *Lynn v. Ashton* (a), where, by a marriage settlement, a fund was settled upon trust for the wife for life to her separate use, and after her decease, for such person or persons as she should by deed or will appoint, with limitations over, in default of appointment, to her children, and if no children, to her next of kin, it was held that the wife, with the concurrence of the husband, was entitled to direct the trustees of the settlement to convey to other trustees upon new trusts, thereby annihilating the trusts of the settlement. In the present case, the settlement gives to the Plaintiff a life interest in the fund to her separate use; she has a general power of appointment by deed or will, and there is no husband, as in *Lynn v. Ashton*, whose concurrence is required to enable her to exercise her power. The late case of *Massey v. Parker* (b) decides that a limitation to the separate use of a woman *sui juris* is nugatory as regards her absolute power of disposition over property vested in her; but even if such a limitation were as operative in the case of the Plaintiff, as in that of a married woman, it cannot be less competent to her than to a married woman, to defeat the possibility of interest given

1835.
Hut.
v.
Cuarton.

(a) 1 *Russ. & Mylne*, 188.

(b) p. 174. *supra*.

1835.


 BILL
 v.
 CURETON.

given under the settlement to children. The Plaintiff will, under the circumstances, be entitled to a re-transfer of the stock, upon satisfying the principal and interest due to the co-plaintiff *Henniker*, against whom, as a purchaser for valuable consideration, the voluntary conveyance is clearly void.

Mr. Barber, Mr. W. C. L. Keene, and Mr. Wood,
contra.

This case does not fall within the principle upon which *Walkwyn v. Coutts*, and *Garrard v. Lord Lauderdale* were decided; for there is here nothing *in fieri*, as in the case of deeds of arrangement for the payment of creditors who are not parties to the instrument, but there is a trust actually created by the settlor; and though the Court will not execute a voluntary agreement,—though it will not give its assistance to constitute a *cestui que trust* without consideration,—it will give effect to a voluntary conveyance by which the relation of trustee and *cestui que trust* is actually established: *Ellison v. Ellison* (a), *Pulvertoft v. Pulvertoft*. (b) There is in this settlement no power of revocation, and it has been held that a settlement in favour of children, without a power of revocation, is not revoked by a subsequent will; for if it could be so revoked, there would be no difference between a deed with a power of revocation, and one without such a power: *Bolton v. Bolton* (c). The property being, in this case, personalty, a trust of it might well have been declared by parol; and in that case, if any thing had been wanting to constitute a complete declaration of the trust, though there might have been an inchoate intention in favour of particular objects, the Court would not give effect to an imperfect declaration:

(a) 6 Ves. 656.

(b) 18 Ves. 84.

(c) 3 Swanst. 414. n.

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declaration: *Bayley v. Boulcott*.^(a) But there is in this case nothing wanting to give effect to the declared intention of the settlor: the trust is well executed, and, being so executed, it cannot be recalled by the settlor. As to the claim of *Henniker* on the ground that a voluntary conveyance is void against a subsequent purchaser for valuable consideration, the foundation of that claim fails, inasmuch as personal property is not within the statute of the 27 of *Eliz*.

1835.
Russ.
a.
CUMSTON.

Mr. *Pemberton*, in reply.

*The MASTER of the ROLLS.**

March 4.

The bill in this case is filed by the party who made a voluntary settlement of stock in 1827, the trusts of which I shall presently state, and by a person who claims through one of the Defendants to whom the settlor, after the execution of the settlement, made an assignment of the fund for a valuable consideration; and the object of the bill is, to obtain the trust-fund from the trustees, or, in other words, to destroy the voluntary settlement. By the settlement of 1827, the stock was transferred to trustees, and the trusts of it were declared to be for the settlor till she should marry; and upon her marriage, for her separate use for life; and after her death, for her children, to be equally divided among them; and in default of children, for her next of kin. The object was, probably, to protect her against wasteful expenditure of this fund, as it does not appear that

any

(a) 4 *Russ*. 345.

* Sir *C. Pepys*.

1835.

BULL.

CHANCERY.

any marriage was in contemplation, and none has taken place.

The settlor, having exceeded the income so secured to her, incurred debts which led to the assignment of the fund under which the other Plaintiff claims; and the question is, whether any relief can be given in this suit.

That a voluntary settlement, where the trust is actually created, is binding upon the settlor, has been so long, and is so fully established, that no attempt to raise the question would probably have been now made, were it not that the modern cases of *Wallwyn v. Coutts* (a), and *Garrard v. Lord Lauderdale* (b) have been supposed to be inconsistent with that doctrine.

The doctrine itself has never been disputed, and has been the subject of repeated decisions, from the cases of *Villers v. Beaumont* (c), in the year 1682, and of *Brookbank v. Brookbank* (d), in 1691, down to the modern cases of *Ellison v. Ellison* (e) and *Pulvertoft v. Pulvertoft*. (g) It must, indeed, have been coeval with the statute of the 27 *Elix.*, inasmuch as the second section of that act declares that voluntary conveyances shall be void only as against purchasers for valuable consideration; assuming, therefore, that, as against the authors of such settlements, they were good. If, therefore, the cases of *Wallwyn v. Coutts* and *Garrard v. Lord Lauderdale* were inconsistent with this doctrine, there would be no doubt on which side the weight of authority would be to be found. But, in fact, those decisions were not

(a) 5 *Mer.* 707.(b) 3 *Sim.* 1.(c) 1 *Vern.* 100.(d) 1 *Eq. Ca. Abr.* 168.(e) 6 *Ves.* 656.(g) 18 *Ves.* 84.

not intended to interfere with the general doctrine, and the grounds upon which they were founded are perfectly consistent with all the preceding cases. It cannot be supposed that Lord *Eldon*, who decided *Ellison v. Ellison* and *Pulvertoft v. Pulvertoft*, and several similar cases, intended to overturn the doctrine upon which they proceeded, by his decision in *Wallwyn v. Coutts*; and the Vice-Chancellor, in *Garrard v. Lord Lauderdale*, expressly draws the distinction, and leaves that doctrine untouched. These two cases, indeed, so far from deciding that a *cestui que trust* becoming entitled under a voluntary settlement had not a good title against the settlor, proceeded upon this, that the character of trustee and *cestui que trust* never existed between the creditor and the trustees of the trust deeds, but that the settlor himself was the only *cestui que trust*, and, therefore, that he was entitled to direct the application of his own trust fund. Whether such views of the relative situation of the creditor and the trustees were correct or not, is immaterial for the present purpose. The grounds, upon which the Judges who decided those cases professed to proceed, are sufficient to prevent their decisions from being considered as authorities against the former well-established doctrine.

I do not wish to have it supposed that I entertain any doubt of the propriety of those decisions. That the distinction between them and the prior cases is somewhat refined, is true; but it is obvious that the distinction has good sense for its foundation, and that the rule, as established by them, is adopted to promote the views and intentions of the parties. A man who, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself by the payment of his debts—his object is not to benefit his creditors; it would there-

1835.
 Bosc
 v.
 Conner.

1895.
BILL
v.
CURETON.

therefore be a result most remote from the contemplation of the debtor, if it should be held that any creditor discovering the transaction should be able to fasten upon the property, and invest himself with the character of a *cestui que trust*. I therefore feel no disposition to question or to depart from the rule established by those two cases.

The result is, that the author of this settlement is bound by it, and is not entitled to the assistance of this Court to release herself from it. The other Plaintiff claims, as a purchaser, under the 27 of *Eliz.*, against the parties claiming under the voluntary settlement; but he cannot stand upon this ground, for the settlement is of stock; and settlements of personal property are not within the 27 of *Eliz.* Consequently the purchaser, not having the protection of the statute, cannot have a better title than the settlor, from whom he purchased; and if he had a good title in himself, he could have no relief in this suit, having associated himself as a co-Plaintiff with the settlor; it having been in several late cases decided that, under such circumstances, no decree can be made, although the Plaintiff might, in a suit in which he was sole Plaintiff, have been entitled to relief.

1834.

ANSTRUTHER v. ADAIR.

1834.
Feb. 18.
June 10.

IN the year 1828, an antenuptial contract, in the common *Scotch* form, was executed in *Scotland* by the Plaintiffs, *James Anstruther* and *Marian* his wife, both of whom were natives of *Scotland*, and domiciled in that country. Under that contract, and in consideration of certain provisions thereby agreed to be made by the intended husband in favour of the wife and children of the marriage, and in consideration also of a covenant, whereby Mr. *Anstruther's* father bound himself to make certain provisions for the benefit of his son, the intended wife "assigned, disposed, and made over to and in favour of the Plaintiff, *James Anstruther*, and herself, and the survivor, in conjunct fee and life-rent, and to the child or children, one or more, of the intended marriage, and the issue of the bodies of such child or children, whom failing, to her own nearest heirs and assignees in fee, all and sundry goods, gear, debts, and sums of money, as well heritable as moveable, that were then belonging or resting owing to her, or that should pertain and be owing to her during the subsistence of the said marriage, other than the provisions secured to her as aforesaid by virtue of the said marriage contract, with all action and execution competent to her thereanent."

The marriage was solemnized in *Scotland* shortly afterwards, and the parties continued to reside there.

Under the settlement made on the marriage of her parents, Mrs. *Anstruther* became entitled, on attaining twenty-

settlement in favour of the wife, in opposition to the provisions of the contract.

Where a contract is made between persons domiciled in a foreign country, and in a form known to the law of that country, the Court, in administering the rights of parties under it, will give it the same construction and effect as the foreign law would have given to it.

If, therefore, a domiciled *Scotchman* would be held entitled, in *Scotland*, by virtue of a marriage contract executed there, and in the *Scotch* form, to receive whatever property accrued during coverture to his wife, this Court will enforce his right, as against any such property coming within its jurisdiction, and will not raise an equity for a

1824.

ANSTRUTHER
v.
ADAIR.

twenty-one, to an absolute interest in a sum of the 3 per cent. stock standing in the names of trustees, subject to her mother's life interest therein. On the death of Mrs. *Anstruther's* mother, in 1833, Mr. *Anstruther* applied to the surviving trustee of the fund, who resided in *London*, and claimed to be entitled, by virtue of the clause in his marriage contract before stated, to have the stock absolutely transferred to him; and the trustee having declined to make the transfer without the sanction of the Court, it became necessary to file the present bill for the purpose of obtaining a transfer.

Mr. *Pepys* and Mr. *Mylne*, for the Plaintiffs, submitted that, as the contract under which Mr. *Anstruther* claimed was drawn in the *Scotch* form, and made between parties domiciled in *Scotland*, the law of that country must govern the construction to be put upon the instrument in order to discover the true intent, and, consequently, the respective rights of the contracting parties: *Feaubert v. Turst* (a), *Talleyrand v. Boulanger* (b), *De la Vega v. Vianna* (c); and, as soon as that construction had been satisfactorily ascertained, this Court would enforce those rights without regard to the peculiar doctrines upon which it was in the habit of acting in the case of married women properly within its jurisdiction. Such had been the uniform practice, even in cases where there was no special contract, and where, therefore, the rights of the foreign husband and wife fell to be determined according to the ordinary law of their own country. If, according to that law, the husband was entitled to receive his wife's property without making any provision for her, this Court ordered her fund to be paid to him at once, without requiring a settlement in her

(a) *Pr. Ch.* 208. 1 *Bro. P.*
C. 129. *Toml.* ed.

(b) 5 *Ves.* 447.

(c) 1 *B. & Ad.* 284.

her favour: *Sawer v. State* (a), *Campbell v. French* (b), *Dues v. Smith*. (c) With respect to the construction put by the *Scotch* law upon such a marriage contract as that of Mr. and Mrs. *Anstruther*, there could not be the least doubt. Several eminent *Scotch* counsel had been consulted, and their opinions, which had been laid before the Defendant for his satisfaction, were all unanimous in holding, that the effect of the clause in question was to entitle the husband, if he chose, to receive the whole fund to his own use, and that neither the wife nor the issue of the marriage took any thing more than a mere *spes successionis* under it.

1834.

Anstruther
 v.
Anson.

Mr. *Sidebottom* and Mr. *Nicholl*, for the Defendant, the trustee, contended that, whether the marriage contract of the Plaintiffs was to be construed according to the *Scotch* or the *English* law, was a question for the Court to determine, and with respect to which, as it was by no means clear, the trustee was entitled to have a judicial declaration before he transferred the stock. Assuming, however, that the law of *Scotland* ought to govern the construction, that law could only be ascertained upon a reference to the Master to inquire into, and state it as a fact for the information of the Court; *Elliott v. Lord Minto* (d), *The King of Spain v. Machado* (e), *Ex parte Cridland* (g); and there would still remain an important question behind, namely, whether, when a trust-fund belonging to a married woman came properly within its administrative jurisdiction, this Court would be justified in parting with the fund, notwithstanding the stipulations of a foreign marriage contract, until some arrangement had been made with the husband for securing the interests of the wife and issue.

The

(a) 1 *Anst.* 63.


(b) 3 *Ves.* 521.

(c) *Jacob*, 544.

(d) 6 *Mad.* 16.

(e) 4 *Russ.* 225.

(g) 3 *V. & B.* 94.

1834.

 ANSTRUTHER
 v.
 ADAIR.

The LORD CHANCELLOR said, it was perfectly clear that the operation of the marriage-contract, and the respective rights of the parties under it, must be determined by reference to the *Scotch* law: a different decision would totally defeat the intention of the contracting parties. Neither did he feel the smallest doubt that the law of *Scotland* had been correctly stated by the Plaintiffs, although, as there was no evidence before him on the point, his opinion was merely extra-judicial; and the Defendant might certainly, if he chose, insist upon having a reference to ascertain the fact. The attempt to raise an equity in favour of the wife and children, beyond or in opposition to the language of the contract, was quite groundless: the stock in question was property of the wife, accruing to her during the subsistence of the marriage, and it fell clearly within the express terms of the proviso, to which the Court was bound to give its legal effect. He should, therefore, make a declaration, that the law of *Scotland* ought to govern the construction of the contract; and refer it to the Master to inquire and state whether, under the contract so construed, the Plaintiff, Mr. *Anstruther*, was entitled to receive a transfer of the stock to himself.

June 10.

The Master having reported that, by the law of *Scotland*, the Plaintiff, *James Anstruther*, was entitled to receive a transfer of the stock, the cause afterwards came on for further directions; when the Lord Chancellor made an order for a transfer accordingly; adding, that he felt so clear as to the principle, that, if there had not been an understanding between the parties on the subject, he should have found a difficulty in allowing the trustee his costs.

REPORTS

OF

CASES

ARGUED AND DETERMINED

1834.

IN THE

HIGH COURT OF CHANCERY.

KEPPELL v. BAILEY.

1834.
Jan. 18. 20,
21. 29.

IN the year 1792 an act of parliament (*a*) was passed, whereby certain persons therein named were incorporated under the name of the Company of Proprietors of the *Monmouthshire Canal Act* provided that, upon auxiliary rail-roads made by private individuals under

(*a*) 32 G. 3. c. 102.

the authority of the act, the tolls should not exceed the rate charged by the canal company, which, for the articles of limestone and iron-stone, was restricted to 2½d. a ton per mile; and it also empowered the canal company, by agreement with the landowners, itself to construct auxiliary rail-roads, on which tolls not exceeding 5d. a ton per mile might be charged. Certain landowners and owners of iron works, and, among others, the lessees of the *Beaufort Works*, formed a joint stock company, and, under the powers given by the act, constructed a rail-road connecting a lime quarry, called the *Trevil Quarry*, with the several iron works and with the rail-roads of the canal company. In the partnership deed of the rail-road company, the lessees of the *Beaufort Works* covenanted for themselves, their heirs, executors, administrators, and assigns, with the other shareholders, their executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns should occupy the *Beaufort Works*, to procure all the limestone used in the said works from the *Trevil Quarry*, and to convey all such limestone, and also all the iron-stone from the mines to the said works along the *Trevil* rail-road, and to pay a toll of 5d. a ton per mile for the same.

Upon a bill filed by the shareholders of the rail-road to enforce this covenant against a person who had purchased the *Beaufort Works*, with notice of the partnership deed; Held,

First, that the covenant did not run with the land so as to bind assignees at law; and that a court of equity would not, by holding the conscience of the purchaser to

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be affected by the notice, give the covenant a more extensive operation than the law allowed to it:

Secondly, that the covenant securing a toll of 5*d.* a ton per mile to the shareholders of the *Trevil* railroad, was a fraud upon the canal company and the legislature, and therefore ought not to be specifically enforced by injunction.

Some of the shareholders having been made co-plaintiffs in the bill without their privity or consent, on their application an order was made, with costs, that their names should be struck out as Plaintiffs.

prietors of the *Monmouthshire* Canal Navigation, and were empowered to make several navigable canals, railways, waggonways, and roads, within the district, and in the manner, and subject to the regulations and conditions therein particularly stated and described; and the company were authorised to charge for the conveyance of different kinds of minerals, goods, and merchandise, respectively, along the line of their canals and railways, sums not exceeding a certain scale of tolls specified in the act. According to that scale it was provided, that for all iron-stone, iron ore, coal, charcoal, lime, and for all tiles, bricks, limestone, flag-stones, and other stone conveyed upon the said canals or railways, a sum not exceeding 2½*d.* per ton per mile should be charged; and for all hay, straw, and corn in the straw, and for all materials used in repairing the roads, or for manure, a sum not exceeding 1½*d.* per ton per mile; and for all other articles not before specified, a sum not exceeding 5*d.* per ton per mile.

The act also contained a provision, in the 108th section, whereby, as soon as the company of proprietors were enabled, out of their clear profits, to make a dividend of 10*l.* per cent among the shareholders upon the capital contributed, certain commissioners were empowered to reduce the rates chargeable for the conveyance of minerals and goods along the company's canals and railways, according to their discretion.

By the 128th section of the act (commonly known by the name of the eight-mile clause), it was enacted, that if the owners of any lands containing mines, minerals, or quarries, or the proprietors, lessees, or occupiers of any iron furnaces lying within the distance of eight miles from any part of the said canals or railways, should find it necessary that any railways or roads should

should be made over the lands of any other persons for the purpose of conveying the produce of their mines or quarries to the canals or railways of the company, and if the company should refuse to make any such railway or road for the space of three months after an application had been made to them, in writing, for that purpose, at a general meeting of the proprietors,—then and as often as such case might happen, the persons who had made such application might, at their own expense, after the expiration of the three months, without the consent of the owners of the lands, make such railways or roads, tendering satisfaction for the damage which might be thereby occasioned to the lands, such damage to be ascertained in the manner therein mentioned; and all such railways or roads, when completed, were to be open to the public for the conveyance of any minerals and goods, on payment to the persons at whose expense the railways or roads had been made, and their heirs or assigns, of such tolls, rates, or duties as should, for the time being, be payable to the *Monmouthshire* Canal Navigation Company for the conveyance of such minerals and goods upon the railways to be made by them.

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The canal company was further empowered by the 129th section of the act, in cases where persons might thereafter be desirous to have a railway or waggonway constructed for their use, communicating with the main line of the company's canals and railways, to enter into an agreement with such persons, and at their request to construct railways and waggonways accordingly, and to take and demand for the conveyance of iron-stone, iron ore, lime, limestone, and other goods and merchandize thereupon, such tolls as should be mutually agreed upon, not exceeding the rate of *5d.* per ton per mile.

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In the year 1795, the proprietors or lessees of three several furnaces and iron works viz. *William Barrow and Matthew Monkhouse*, of the *Sorwy* or *Sirhowy* Furnace, *Edward Kendall* and *Jonathan Kendall*, of the *Beaufort* Iron Works, and *James Harford* and *Jeremiah Homfray*, of the *Ebbw Vale* Iron Works, in conjunction with a number of other persons, formed themselves into a joint stock company, for the construction of a rail-road called the *Trevil* Rail-road, under the powers given by the 128th section of the *Monmouthshire* Canal Act. The rail-road was accordingly constructed, and the legal estate in it was vested, by a demise for a term of 2000 years, in certain trustees, upon trust for the several shareholders in the railway company, in the proportions to which these had respectively contributed towards the expense of the undertaking.

A body of rules and regulations was, at the same time, framed for the government of the shareholders of the rail-road as a company; and by an indenture, dated the 16th of *August* 1795, which was executed by the proprietors of the aforesaid furnaces and iron works, and by the other subscribers, and in which all these regulations were embodied, it was witnessed that each of the parties thereto, for himself, his heirs, executors, administrators, and assigns, covenanted with the others of them, and their and his executors, administrators, and assigns, mutually and reciprocally, that they, or their respective executors, administrators, or assigns, would remain co-partners and proprietors of the *Trevil* rail-road, and the profits to be divided therefrom, during the continuance of the demise which they had obtained, subject to the conditions and regulations therein specified. The indenture went on to declare, that the rail-road and the profits thereof should be divided into fifty-five shares, which should be vested in the parties thereto and their
respective

respective executors, administrators, and assigns, for their respective use and benefit, in proportion to the sums of money subscribed by them respectively ; and it then specified the number and particulars of the shares allotted to the several subscribers, of which shares the five respectively numbered from 7. to 11. inclusive were stated to belong to *Edward Kendall* and *Jonathan Kendall*, their executors, administrators, and assigns, as joint-tenants.

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The indenture proceeded to recite, that the proprietors of the iron furnaces, parties thereto, necessarily made use of great quantities of lime-stone in their furnaces, which for a long time past they had procured from a quarry called the *Trevil* Quarry, and carried to their furnaces at a great expense, for the more convenient carriage of which the *Trevil* rail-road was chiefly intended, and that it was in consideration of the quantity of lime-stone which would be carried upon the said rail-road for the use of the furnaces, and of the quantity of iron-stone which would also be carried upon the rail-road, that the other parties became subscribers to the undertaking ; and that at the time of the subscription, it was understood that the said proprietors of the furnaces would respectively enter into an engagement to procure all the lime-stone which they might want from the said *Trevil* quarry and convey it along the said *Trevil* rail-road, and also pay to the proprietors of the rail-road a toll of 5*d.* per ton per mile for all such lime-stone, as well as for all iron-stone, and for all other goods, except stone for building, which was to pay a toll of 1½*d.* per ton per mile ; and that it was also understood that the said proprietors of the furnaces should respectively engage to carry upon such part of the rail-road as should lie between their mines and their furnaces, all such iron-stone as they should have occasion to convey to their respective

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furnaces; and thereupon, as regarded *Edward Kendall* and *Jonathan Kendall*, who were the proprietors of the furnace called the *Beaufort Iron Works*, it was witnessed, that they, the said *Edward Kendall* and *Jonathan Kendall*, in consideration of all and singular the premises, did thereby, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with all the other parties thereto, and their executors, administrators, and assigns, that they the said *Jonathan Kendall* and *Edward Kendall*, their executors, administrators, or assigns, should from time to time, and at all times thereafter whilst they or any of them should be proprietors or lessees or occupiers of the said furnace and works, called the *Beaufort Iron Works*, procure all the lime-stone which should be wanted for the use of the said iron works, or for any new furnace and works thereafter to be erected by them, near the same, from the quarry called *Trevil Quarry*, and should cause all such lime-stone to be carried from the said quarry to the said iron works along or upon the *Trevil* rail-road, and should also cause all the iron-stone or mine which they should have occasion to convey from their mine works to their furnace called the *Beaufort Iron Works*, or to such new furnace, to be carried along such part of the rail-road as should lie between such mine works and the furnaces; and also should pay, or cause to be paid to the collectors to be appointed by the proprietors of the rail-road for the time being to receive the tolls for the conveyance of goods thereon, a toll of 5*d.* per ton per mile, for all lime-stone, iron-stone, or mine, goods, wares, merchandises, and commodities whatever, except stone for building, and a toll of 1½*d.* per ton per mile for all stone for building, belonging to them the said *Edward Kendall* and *Jonathan Kendall*, their executors, administrators, or assigns, or any of them, which should be carried or conveyed upon the rail-road, or any part thereof, and

so in proportion for any greater or less quantity than a ton. The indenture also contained covenants on the part of Messrs. *Barrow* and *Monkhouse*, and Messrs. *Harford* and *Humfray*, with reference to their respective iron works, similar in point of form to the covenant entered into by the *Kendalls*.

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Edward Kendall and *Jonathan Kendall* held the *Beaufort* Iron Works by a lease for a long term of years from the Duke of *Beaufort*. The *Trevil* quarry was also the property of the Duke of *Beaufort*, who was in the habit of permitting such of the neighbouring iron masters as held their works under demises from himself, and among the rest the *Kendalls*, to procure from it an unlimited supply of the lime-stone required for the use of their respective furnaces.

The *Trevil* rail-road was completed soon after the date of the before stated indenture, and, subject to changes occasioned by the deaths of shareholders, sales of shares, and other contingencies, continued to be carried on and managed in pursuance of the regulations set forth in that indenture.

Edward Kendall died in the year 1807, and *Jonathan Kendall*, in the year 1812. In consequence of the decease of the *Kendalls*, the deaths of succeeding partners, and other circumstances, changes from time to time took place in the proprietorship of the *Beaufort* Iron Works, between the years 1795 and 1821. In the last mentioned year the works became the partnership property of *Edward Kendall*, the son of *Edward Kendall*, deceased, *William Henry West*, and *William Hibbs Bevan*, who in January 1833 contracted with *Joseph Bailey* and *Crawshay Bailey*, to sell to them all their interest in the

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Beaufort Iron Works for the residue of the term of years for which the works were demised, giving them full notice of the liabilities to which they were subject under the indenture of *August* 1795. Messrs. *Bailey* paid part of the purchase money in pursuance of this contract, and entered into possession of the premises at *Lady-day* 1833, before any conveyance or assignment was executed; and shortly afterwards they commenced the formation of a new rail-road from the *Beaufort* Iron Works to certain other lime quarries, situate to the eastward of the *Trevil* quarry.

The present bill was filed by the shareholders of the *Trevil* rail-road, and it prayed an injunction to restrain Messrs. *Bailey* and their agents from using this new rail-road, or any other rail-road, except the *Trevil* rail-road, agreeably to the stipulations contained in the indenture of *August* 1795. An *ex parte* injunction having been accordingly obtained in the month of *August* last, a motion was now made, upon affidavits, that the injunction might be dissolved.

Mr. Pepys, *Mr. Jacob*, and *Mr. Humphry*, for the motion.

Sir E. Sugden, *Mr. Knight*, and *Mr. Lynch*, in support of the injunction.

The case was very elaborately argued on both sides. The principal points raised and contested in the course of the argument, and the authorities referred to as bearing upon them respectively, were the following:—First, whether the word “assigns” used in the covenant of the *Kendalls* applied to the assigns of the *Beaufort* Iron Works, or only to their assigns of the rail-road shares.

Secondly,

Secondly, whether the Plaintiff's remedy, if any, was not more properly by an action at law for damages, or by a simple bill in equity for an account, without insisting upon a compulsory performance of the covenant; *Flint v. Brandon* (a), *Barret v. Blagrove*. (b) Thirdly, whether the contract, either as it stood originally, or as it had subsequently, from the change of circumstances become, was not of so unfair and oppressive a character that it would not be equitable to enforce it by injunction; *Smith v. Fromont* (c), *Collins v. Plumb* (d), *The Duke of Bedford v. The Trustees of the British Museum*. (e) Fourthly, whether the contract was not ineffectual, if not at law, at all events in equity, upon grounds of public policy, and by reason of its operating injuriously in restraint of trade; *Mitchel v. Reynolds* (g), *Young v. Timmins* (h), *Cruttwell v. Lye* (i), *Jones v. Edney* (k), *Cooper v. Twibill* (l), *Holcombe v. Hewson* (m), *Doe v. Reid* (n), *Morris v. Colman* (o), *Williams v. Williams*. (p) Fifthly, whether covenants like the one in question, inasmuch as they created upon the property a burthen which tended to a perpetuity, and placed land in a great measure *extra commercium*, were deserving of encouragement or assistance in this Court; *Third Report of the Real Property Commissioners* (p. 54.). Sixthly, whether the provision, securing to the shareholders in the rail-road a toll of 5*d.* a ton per mile upon the minerals conveyed, being double the toll permitted to be charged upon the railways belonging to the canal company,

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(a) 8 *Ves.* 159.

(b) 5 *Ves.* 555.

(c) 2 *Swan.* 330.

(d) 16 *Ves.* 454.

(e) p. 552. *infra*.

(g) 1 *P. Wms.* 181.

(h) 1 *Crom. & Jer.* 331.

(i) 17 *Ves.* 335.

(k) 3 *Camp.* 285.

(l) *Ibid.* 286. n.

(m) 2 *Camp.* 391.

(n) 10 *B. & Cress.* 849.

(o) 18 *Ves.* 437.

(p) 2 *Swan.* 255.

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pany, was not a violation of the letter and spirit of the Canal Act, and a fraud upon the legislature, the canal company, and the public, and therefore not to be enforced by injunction. Seventhly, whether the covenant entered into by the *Kendalls* did or did not run with the land, so that an action could be maintained upon it against their assigns; *Spencer's case* (a), *Anonymous* (b), *Bally v. Wells* (c), *Mayor of Congleton v. Pattison* (d), *Collins v. Plumb* (e), *Canham v. Rust* (g), *Hartley v. Pehall* (h), *The Duke of Bedford v. The Trustees of the British Museum* (i), the *Cases on Brewers' Leases*, already cited: *Vyryan v. Arthur* (k), *Uxbridge v. Staveland* (l), *Case of the Manchester Mills* (m), *Holmes v. Buckley* (n), *Brewer v. Hill* (o), *Jourdain v. Wilson* (p), *Vernon v. Smith* (q), *Sampson v. Easterby* (r), *Barclay v. Raine*. (s) Eighthly, whether, assuming the covenant to be inoperative at law as against assigns, it might not still be held effectual here, on the ground that the notice which, prior to their purchase, the Defendants had received of the existence and nature of the covenant, imposed an obligation which bound them in conscience, and which a court of equity would not suffer them to violate; *Case of the Steyne at Brighton*, unreported, *Furnival v. Crew* (t), *Treatise of Equity* (u), *City of London v. Richmond* (x),
Collins

(a) 5 Rep. 16. a.

(b) Godb. 120. S. C. Moore,

243.

(c) 3 Serjt. Wils. 25.

(d) 10 East, 130.

(e) 16 Ves. 454.

(g) 8 Taunt. 227.

(h) 1 Peake's N. P. C. 131.

(i) p. 552. *infra*.

(k) 1 B. & Cress. 410.

(l) 1 Ves. sen. 56.

(m) 1 Dougl. 222. n.

(n) P. Ch. 39.

(o) 2 Anst. 413.

(p) 4 B. & Ald. 266.

(q) 5 B. & Ald. 1.

(r) 9 B. & Cress. 505. S. C.

(in error) 6 Bing. 644.

(s) 1 S. & S. 449.

(t) 5 Atk. 83.

(u) B. I. ch. 5. s. 4.

(x) P. Ch. 156. S. C. 2 Vern. 421.; and on appeal, 1 Bro. P. C. 516. Toml. ed.

Collins v. Plumb (a), Third Report of the Real Property Commissioners, Barclay v. Raine. (b)

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The LORD CHANCELLOR.

This case was argued with much learning on both sides, and was presented to the court in every view that could be taken of the various points raised. Into the whole of the matters discussed at the bar it will not be necessary to enter. But I shall advert to some of them beyond those upon which the decision turns, on account of their intrinsic importance.

I am not greatly struck, notwithstanding the ability with which it was pressed, with the argument against the covenant in question derived from its supposed repugnance to the rules respecting perpetuity. I do not at all doubt that the enjoyment of property may be tied up and an illegal perpetuity created by annexing conditions to grants, or by executing covenants, whereby whoever happens to be in possession shall be restrained from using that which is the subject of the grant or covenant in all but a certain prescribed way, provided always that the restraint so constituted is not reserved in favour of some other party, who may release it at his pleasure; and, therefore, all such conditions and covenants are void if they go beyond the period allowed by law. But if the party for whom the condition is made, or the party covenantee has the entire power of dealing with his interest in the subject matter, it is an obvious mistake to treat this as an instance of perpetuity or of any tendency towards perpetuity. Indeed the property, the subject matter of consideration here, is, not the estate fettered by the condition or covenant, but the benefit reserved
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(a) 16 Ves. 454.

(b) 1 S. & S. 449.

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by the condition, or secured by the covenant; and upon that, there is by the hypothesis no restraint at all: and certainly, to take another view, though one of the parties interested, the owner of the property subject to the covenant or condition, may be fast, the other is loose; and so *quoad* both taken together, that is, *quoad* all interested, the property is free. Thus admitting that the owners of an estate could no more be restrained perpetually from cultivating it by supplies derived from any but one market, or from selling its produce at any but that market, than they could be restrained from selling the estate, and admitting that the one would be as much a breach of the rule against perpetuity as the other, it would be no such violation, nor would it in any way defraud that rule, if the owner of the estate were restrained from buying and selling at any market save that belonging to a certain party entitled by grant or by covenant to the privilege, and which he might at his pleasure vary or extinguish.

Upon other grounds, such a restraint may be objectionable and void in law, as well as bad in policy; but certainly not upon the doctrine of perpetuity, by which it is no more struck at, than a right of way or other easement which the owners of one estate may enjoy over the close of another. Such easement continues to be enjoyed by the owner of the one estate, whoever he may be, over the other estate, into whose hands soever it may come. So of a rent issuing out of an estate, and which may nearly absorb its profits, no one ever deemed this objectionable on the ground of perpetuity. The easement and the rent are the property in question, and they are free. The party entitled to the tenements is interested in the tenements subject to the easement or yielding the rent; the other party has the incorporeal hereditaments connected with the corporeal

corporeal hereditament of the lands; and the circumstance of the land being subject to his rights, while he is unfettered in the enjoyment and the disposal of those rights, does not either constitute or tend to a perpetuity. I am, therefore, clearly of opinion, that the covenant to take the lime at the *Trevil* works, and carry the iron by the *Trevil* railway, is not bad on the ground of its tending to a perpetuity, or constituting a shift, whereby the rules of law, on that head, may be evaded.

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There appears, at first, to be more weight in the objection which was also urged, that covenants of this description are in restraint of trade. The covenant, here, is not contended to be in general restraint of trade, which would, beyond all doubt, make it void in whatever way the purpose was effected—whether by promise or bond, with or without consideration. The restraint is only partial; and then the law will support it, if, to use the words of *Parker* C. J. in his elaborate judgment in *Mitchel v. Reynolds* (a) “in the opinion of the Court, whose office it is to determine upon the circumstances, it appears to be a just and honest contract.” In that case, the covenantor restrained himself from exercising his trade of a baker for five years, in the premises demised to him for that term by the same instrument; and the Court dwelt on the period of the restriction being co-extensive with the term as proof of adequate consideration.

But though the Court is to judge, generally speaking, whether or not the consideration be adequate, the Court, plainly, has no very delicate scales for weighing the adequacy, and comparing it with the restraint. That the covenantors, in the present case, derived considerable benefit from their bargain cannot be doubted.

(a) 1 P. Wms. 181.

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doubted. The contract enabled them, as well as the other parties, to obtain the advantage of the railway, which, but for this arrangement, would, probably, never have been constructed. The public, moreover, obtained the like benefit; and although, in the course of time and the progress of improvement, that advantage has ceased, and it is said that great detriment arises, both to the three iron works and to the community, from the continuance of the restriction, it is plainly as incorrect as it is unjust in such a case to judge by the event, and to measure the consideration for originally submitting to the restraint, by the benefit now derived from the works then erected, making the adequacy of that consideration depend upon all that has happened in altered circumstances; or, in other words, allowing a party, who, with his eyes open, made a bargain for his own benefit, and which was really beneficial at the time, to escape by shewing that it has eventually become less advantageous than he expected, or even actually detrimental. No case can be found where such a rule has been applied, or where any standard has been resorted to for trying the consideration, except the circumstances inherent in the contract itself, independent of accidents and events.

The want of mutuality is, indeed, urged against this covenant; it is said, that though one party is bound to use the railway, the other is not bound to maintain it; and this is likened to the case of *Young v. Timmins* (a) in the Exchequer, and *Smith v. Fromont* (b) in this Court. I think there is some ground for this argument, though, upon the whole, it would not be decisive against the covenant, if the covenant could stand in other respects; for, besides that an undertaking to keep the railway in repair may

(a) 1 *Crom. & Jerv.* 331.

(b) 2 *Swan.* 330.

may be implied upon the construction of the whole, it seems sufficient to say, that if the covenant were otherwise binding, the covenantors or their assignees might have their remedy, if not upon such implied covenant, certainly by being released from their own obligation as soon as the railway failed them.

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The utmost, therefore, that can be said upon this branch of the case is, that such contracts deserve no particular favour. They are at all times somewhat improvident with respect to the individuals, and the public interest is upon the whole more likely to lose than to gain by them. The policy of the law is against them, the proof is thrown upon those who support them, and claim under them; and that proof should, with every thing belonging to the case that rests on them, be narrowly watched.

Bearing this in mind, I now come to an objection of a very serious nature, and which appears to me of itself sufficient to dispose of the present application for the interposition of the Court by way of injunction.

The *Trevil* rail-road was made under the powers given by the *Monmouthshire* Canal Act, for the formation of that canal, and the cuts belonging to it, and of railways and stone roads communicating from them to the several adjacent iron works in the counties of *Monmouth* and *Brecon*.

By the 91st section of that act, the company are limited to certain rates of toll on the railways, as well as on the cuts. The rate charged on lime-stone, iron, &c., is not to exceed 2½d. per ton per mile; and by the 128th section, if any persons are minded to make a railway within the distance of eight miles, they are to give the

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the company notice, and if the latter refuse or neglect for a given time, they may themselves undertake it; but no greater rate is to be paid on that railway than the $2\frac{1}{2}d.$ which the company are authorised to charge. By the 129th section, however, persons may agree with the company and induce them to undertake such railways on payment of tolls, not exceeding $5d.$ per ton per mile.

Two objects are here manifestly in the contemplation of the legislature, and form the governing policy of this important part of the act. First, a preference is given to the company, who rather than any private individuals, are to make the railway; and it is only on their refusal or declining, that any other parties are to be at liberty to undertake it. And, secondly, the public, that is, the proprietors of adjoining closes, are not to be subject to the strong powers of the act (powers which it has in common with all such acts, but which are always to be most strictly pursued), unless there is the reasonable certainty that there will be a considerable traffic on the road,—a traffic sufficient to maintain it at the limited rate of charge.

Now the agreement of 1795 violates both these provisions, by the covenant among the parties to pay $5d.$ per ton. It deprives the company of its prior right to make the road subject to the higher rate of charge, and it deprives the neighbouring owners of the security intended to be given them that their property should not be invaded unless a traffic of a certain amount was to be expected. All courts have, for obvious reasons, at all times construed such provisions most strictly. Whatever is required to be done as condition precedent to exercising the extraordinary right of making roads over private property, has always been exacted to the letter, and

and the party omitting been held a trespasser. Here the ground cannot perhaps be said to have been taken by the Rail-road Company until they had performed the things previously ordered to be done; but the act of parliament having given a general security against the encroachment unless a certain state of things existed, that provision has been evaded by an arrangement among the parties wholly contrary to the plain intention of the legislature, and in fraud, if not in defiance of it.^(a)

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Although I consider this as being a sufficient ground for dissolving the injunction, it is far from being the only ground; and I shall now add that, upon the best consideration which I can give to the nature of the covenant, it appears to me very clearly that the covenant does not run with the land, and therefore is not binding upon the assignees of the *Kendalls*. This is the opinion which I have entertained from the moment I saw it, and which further reflection has only served to confirm.

Between the estates of the occupiers of the three iron works, and the estates or the persons of their associates in the railway speculation with whom they covenant, there is no privity, no connexion whatever of which the law can take notice. There is no relation at all in point of fact, any more than in point of law. The *Kendalls* for instance, upon whose covenant the present Plaintiffs rely, contending that it binds the Defendants as purchasers of the *Beaufort* Iron Works, did not stand in any such relation to the other share-holders, as from its nature could enure to affect the property sold by them. There was no unity of title in the estates of the contracting

(a) See Lord *Eldon's* observations in the case of *Blakemore v. The Glamorganshire Canal Navigation*, 1 *Myline & Keen*, pp. 162—4.

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contracting parties; the iron works and the lime-pits or railway, did not come to them severally from the same owner; they were not held by them severally under the same landlord; but what is of more importance, inasmuch as it is by no means clear that even the kinds of privity I have mentioned would suffice, the parties did not stand in the relation of lessor and lessee towards each other; and there is, therefore, no reversionary interest now in the covenantees to which the right claimed against the assignees of the covenantors may be annexed; and those assignees are called upon to perform the covenant solely in respect of the estate which they have purchased, and, in respect of persons who, except under that covenant, have no connexion whatever with the estate. It is the case of mere strangers; it is a covenant by the owner of a messuage and land with the owner of a neighbouring lime work and rail-road, that he and his executors and assigns, will always use that lime work and rail-road, for making iron at, and carrying it from, such messuage.

Whether the word "assigns" in this covenant, used as it is in a very peculiar manner several times in the deed, means assigns of the works, or only of the railway shares, has been made a question; and if it were necessary to decide it I incline much to the latter construction, which, if adopted, would render it unnecessary to pursue the argument further. But I think this admits of sufficient doubt to make it more advisable that the decision should not turn upon it.

Assuming then for the present that the *Kendalls* covenanted for their assigns of the *Beaufort* works, could they, by such a covenant with parties who had no relation whatever to those works except that of having a lime quarry, and a railway in the neighbourhood, bind all persons

persons who should become owners of those works, either by purchase or descent, at all times to buy their lime at the quarry and carry their iron on the railway? Or could they do more, if the covenant should not be kept, than give the covenantees a right of action against themselves and recourse against their heirs and executors as far as these received assets?

1889.

KEFFELL
v.
BAILEY.

Consider the question first upon principle. There are certain known incidents to property and its enjoyment; among others, certain burthens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognized by the law. In respect of possession, the property may be in one, while the reversion is in another; in respect of interest, the life estate in one, the remainder in tail in a second, and the fee in reversion in a third. So in respect of enjoyment, one may have the possession and the fee simple, and another may have a rent issuing out of it, or the tithes of its produce, or an easement, as a right of way upon it, or of common over it. And such last incorporeal hereditament may be annexed to an estate which is wholly unconnected with the estate affected by the easement, although both estates were originally united in the same owner, and one of them was afterwards granted by him with the benefit, while the other was left subject to the burthen. All these kinds of property, however, all these holdings, are well known to the law and familiarly dealt with by its principles. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in

1664,

 K. P. P. P. P. P.
 c.
 BAILEY

binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can conceive; for there can be no reason whatever in support of the covenant in question, which would not extend to every covenant that can be devised.

The difference is obviously very great between such a case as this, and the case of covenants in a lease, whereby the demised premises are affected with certain rights in favour of the lessor. The lessor or his assignees continue in the reversion while the term lasts. The estate is not out of them, although the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of property that certain things should be reserved to the reversioners, all the while the term continues: it is only something taken out of the demise, some ex-
 ception

ception to the temporary surrender of the enjoyment; it is only that they retain, more or less partially, the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end. Yet even in this case, the law does not leave the reversioner the absolute licence to invent covenants which shall affect the land in the hands of those who take by assignment of the term. The covenant must be of such a nature as "to inhere in the land," to use the language of some of the cases; or it must concern the demised premises and the mode of occupying them," as it is down in others; "it must be *quodammodo* annexed and appurtenant to them," as one authority has it; or, as another says, "it must both concern the thing demised, and tend to support it and support the reversioner's estate." Within such limits restraints upon the land demised may be imposed, which shall follow it into the hands of persons who are strangers to the contract of lease, and who only become privy to the lessor through the estate which they take by assignment in the demised premises. But this is no more than saying that, within such limits, the owner of the land may retain to himself and his assignees of the reversion a certain controul over, or use of, the property which remains in himself, or which he has conveyed to those assignees; and that he may so retain it, into whose hands soever, as lessee, the temporary possession may have come. Even he, the continuing owner, is confined within certain limits by the view which the law takes of the nature of property; and if beyond those limits he were to imagine a stipulation, the covenant in which he should embody it would not run with the land, but only bind the lessee personally, and his representatives.

It only requires a little attention to the cases, to satisfy us, first, that even where the privity of lessor and lessee



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v.

BAILEY.

exists, there are bounds so narrow to the province of real covenants, as would make the one in question lie on the extreme verge of it, if it did not fall without it; secondly, that there can be no doubt of such a covenant being one personal, collateral, or in gross, where there does not exist that, or some other privity of estate, which according to one or two of the authorities only, and which I venture to doubt, has been held to render real, covenants which would otherwise have been personal; and, thirdly, that those covenants which have been held real, excepting, indeed, such as relate to title, would have been deemed collateral had there been no privity in respect of reversion or other unity of title. As all these propositions are proved or illustrated by most of the cases, there would be no convenience in arranging them under these heads; it would only lead to repetition; and therefore, having stated the propositions as the doctrine which may be extracted from them, applicable to this case especially, indeed, but embracing the subject at large, it will be better to take the authorities in succession.

Spencer's case (a) was an action by a lessor against the assignee of the lessee, upon a covenant by the lessee for himself, his executors and administrators, that he, his executors, administrators, or assigns, would build a wall on the premises demised. So, at least, is the statement of the case, and so it has always been taken, particularly in the excellent abstract of the resolutions given in *Bally v. Wells* (b), although the second resolution is somewhat ambiguously worded. The rule there laid down is, that the assignee, being named, shall be bound by the covenant to build on the land demised, because he is to take the benefit of it; but that he shall not be bound, where the covenant is to build on land of the

(a) 5 Rep. 16. a.

(b) 3 Serj. Wils. 25. Wilm. 344.

the lessor not parcel of the demise. It is hardly necessary to inquire whether this resolution would have supported such a covenant as the present, had that occurred in a lease, and the action had been brought on the reversion against the assigns of the lessee; but assuredly the obligation to carry off the produce of a farm or mine by a particular way and on certain terms, must be allowed to have a very different species of annexation to the land from the covenant to build upon it. Such a covenant can with difficulty be said to be annexed to and inherent in the thing demised, and certainly is not in support of it.

1834.
KETTLE
BANKY.

Laurence Pakenham's case (a) referred to by Lord Coke, was an action by the feoffee of a manor against a prior and convent, upon a covenant with the feoffor to sing in a chapel, parcel of the manor. It appears from the report, that it had been a chantry time out of mind; it is not stated whether the convent was on the manor or had lands by grant from the lord: but it is admitted both there, and in another case (b), that the covenant would not have run with the land, had it been to sing in a chapel not belonging to the covenantee. Upon the former of these cases it may be observed, that the covenant was by a corporation, and consequently no question arose as to its binding the assignee of the covenantor, but only whether it ran with the land in favour of the covenantee's assignee. There the Chief Justice, in the course of the argument, throws out a remark with respect to the plaintiff being, though a feoffee, yet of the blood of the covenantee, his grandson and one who might be his heir. But laying these things aside, could it now be maintained that a covenant by the purchaser of

(a) Y. B. 42 *Edw.* 5. fo. 3.

(b) *Horne's case*, Y. B. 2 *Hen.* 4. fo. 6. b.

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of a messuage within a manor to exercise any trade then beneficial to the lord or his tenant, as continually to keep school, or continually to have a blacksmith's or other shop, could be sued upon by a purchaser of the manor? nay more, that such covenant would run with the land, though made, as in *Pakenham's* case, by a party or corporation not a purchaser of the messuage? nay, as must be contended, in order to make that case applicable here, that the lord or his vendee of the manor could sue any one who might at any distance of time become, by purchase from the covenantor, owner of the messuage, for not exercising therein the stipulated trade? In a word, will the law recognise the devoting a house to this or that trade, and impressing upon it, into whose hands soever it may come, the obligation to carry on the trade for the benefit of the manor or of the other property of the party covenantee, to whom the house originally belonged? The law cannot do so, without sanctioning the creation of a new species of tenure by means of such covenants.

Uxbridge v. Staveland (a) arose upon a covenant in a lease; but the opinion of Lord *Hardwicke* is merely an *obiter dictum*, the covenant on which he decided being held not to run with the land. It is not only *obiter*, but the opinion is faintly stated:—"Had it been covenanted," said his Lordship, "to grind all the corn they should spend ground, it might relate to the premises, and, running with the land, bind the assignees." But he afterwards added, that setting all this aside, and supposing the assigns to be bound, they were not there shewn to be assigns." Even, therefore, in the case of such a covenant as he supposes occurring in a lease, and upon a question with the reversioner, this is but a slight authority.

I shall

(a) 1 *Ves. sen.* 56.

I shall mention *Vyoyan v. Arthur* (a) next, because it relates to a similar covenant, and must, I think, be allowed to go further than any other case of the kind. That was an action of covenant, by the devisee of the lessor, against the personal representative of the lessee, upon a lease containing, in the *reddendum*, a reservation of suit to the lessor's mill, by grinding there all the corn grown upon the land demised, which mill the lessor had devised to the plaintiff along with the reversion of the land demised. The Court decided that the action lay, upon the ground that both the mill and the reversion were in the ownership of the assignee of the covenantee. Mr. Justice *Bayley* expressly says that his judgment is founded entirely upon this unity of title; and Mr. Justice *Holroyd* adopts nearly the same view, regarding the thing to be done as a rent service to the lessor by the tenant. It is difficult to reconcile this decision with *Spencer's* case, and the others, which hold that the thing to be done must be on the demised premises; and it is equally difficult to avoid a suspicion that the peculiar nature of the thing in question, — grinding at a mill of the lessor, — had some influence upon the Court in supporting the covenant as real. The familiar idea of a lord's mill, and of the mill service due from the soke, not unnaturally mixes itself with the consideration of such cases, and leads one to forget, for the moment, the origin of that service in the feudal relation of the lord of the mill and the manor and the tenants of the manor. Accordingly, the Court speaks of "rent service," and says that this was in the nature of such a render. Perhaps cases might be put, in which a covenant to the lessee would not have been so certainly held real. Suppose it had been to carry all the cattle or poultry raised on the farm to market where

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 KEPPELL
 v.
 BAILEY

(a) 1 B. & Cress. 410.

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 v.
 BAILEY.

where the lessor had pickage and stallage, or to purchase all cloth used upon it at the lessor's shop. It is not necessary, for supporting the view I take of the case at bar, to determine whether, in a lease, such covenants would have been collateral; but it would probably have been found more difficult to hold them real, as being in the nature of rent service, than where the obligation referred to grinding at the landlord's mill.

Sampson v. Easterby (a) went upon the assumption that the lessor had a right to erect buildings on the waste, and that, when erected, they became his. The Court, therefore, held the lessee's covenant (or rather implied covenant, for there was none *per directum*) to build on the waste, as running with the mineral demised, because such building was wholly connected with the mines, and tended to their support, the building he was bound to raise being a smelting house.

In *Tatem v. Chaplin* (b), a covenant to reside in the demised premises during the term, was held to bind the assignees, though not named, on the authority of the first and sixth resolutions in *Spencer's* case, being, it was said, *quodammodo* annexed and appurtenant to the thing demised, and plainly tending to support it. Suppose there had been no demise and no privity by the reversion, could a covenant to reside in a given messuage bind assignees of a purchaser, and be sued upon by the seller of the messuage? In other words, can a man, by a covenant with a seller of a house, bind all who may ever live in that house after he shall have sold it, and his vendees sold it over and over again, to reside constantly in it? The question answers itself; but it also marks the distinction between such cases and the

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(a) 9 B. & Cress. 505. S. C. (b) 2 H. Black. 135.
 (in Error) 6 Bing. 644.

one at bar. The like observation arises upon *Jourdain v. Wilson (a)*, which was a covenant to supply the house demised with water at a given rate; and upon *Vernon v. Smith (b)*, where an act of parliament had, as it were, connected the covenant to insure with the reversion, by directing the money received from the office to be bestowed on the demised premises; and upon *Bally v. Wells (c)*, which was on a covenant by the lessee of tithes not to let the farmers of the parish have any of their tithes without leave of the lessor, who was the parson, the Court held this to be a covenant to compel whoever had the perception of tithe to take in kind, for the purpose of excluding circumstances that might be made the ground of settling up moduses; they considered such a covenant as only prescribing a mode of managing or occupying the thing demised, likened it to an obligation to spend the muck on the land, and regarded it as clearly tending to support the estate; but they added what is very material for our present purpose,—“Here is a reversion in the lessor, and a privity between him and the assignee.”

1834
KERR
v.
BARRY

In the same spirit, Lord *Kenyon*, when delivering the judgment of the Court on the much contested and well considered case of *Webb v. Russell (d)*, distinctly said, “It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties.” Whether he would have held the privity to be sufficient, which existed in *Vyryan v. Arthur*, by the unity of title in the lessor’s assignee to the premises demised, and to the mill where the thing was to be done, it is not necessary here to inquire. At least, it may be said that there was, in that case, the privity of the reversion.

Nor

(a) 4 B. & Ald. 266.

(b) 5 B. & Ald. 1.

(c) 3 Serj. Wils. 25.

(d) 3 T. R. 593.

1854.
 KEPPELL
 v.
 BAKER.

Not is it, perhaps, very easy to reconcile the principle of the latter case with *The Mayor of Congleton v. Pattison* (a), where the thing to be done was upon the demised premises, although the interest to which that thing related was not immediately and directly in the lessors. But it is of more importance to observe, that the present question cannot be determined in favour of the covenant binding the assignee, if that case of *The Mayor of Congleton v. Pattison* is law, which never has been doubted.

This will appear still more plainly on reference to *Collison v. Lettsom* (b), decided in the Common Pleas upon the authority of that case. The covenant there was by the lessor owner of lands near the premises demised, for himself, his heirs and assigns, to give the lessee, his executors, administrators, or assigns, the preemption of that neighbouring land not demised. The lessor sold both the one parcel and the other, and it was held no breach of the covenant; in the course of the argument, the counsel for the plaintiff abandoned the ground that the covenant ran with the premises demised, admitting, upon the authority of *The Mayor of Congleton v. Pattison*, that it was collateral,—a proposition to which the Court assented. So, if the case had been reversed, and the lessee had covenanted to give preemption of other land to the lessor, it follows, that the assignee of the lessee, though also owner of that other land, would not have been bound by the covenant.

In deciding *Bally v. Wells*, the Court appears to have felt the force of *Parfry's* case (c); and they avoided it, by shewing that the covenant supported the thing

(a) 10 *East*, 150.
 (b) 6 *Taunt.* 224.

(c) *Godb.* 120. *Moore*, 245.

thing demised, and concerned the mode of occupying it. It is plain, from the manner in which the Chief Justice alludes to that case, that he would have found it much more difficult to evade its force, had he been deciding, as the Court was called upon to decide in *Vyryan v. Arthur*, that a covenant to do something, on the premises not demised, with the produce of the demised premises bound the assignee of the lessee, or could be sued upon by the devisee of the lessor.

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KEPPEL
v.
BAILEY.

I have said nothing of the case of *The British Museum* (a), because the point analogous to the present was not there determined. Having been furnished with the notes of what passed upon the appeal motion in that case, I find that Lord *Eldon* carefully guarded against being supposed to give any opinion on the question whether the covenant ran with the land. The decision turned upon another view of the case, which prevented the question from going to a court of law, as the Vice-Chancellor had directed; but I have reason to believe that, upon the question whether the covenant ran with the land, the opinion of, at least, some of the common law judges was in the negative.

It is unnecessary to go into the discussion of the covenant in brewers' leases, to take beer only at the lessor's brewery. I am not aware of any decision having ever authorised the position, that such a covenant binds the assigns of the lessee. Lord *Kenyon*, having occasion to mention the subject at *Nisi Prius* in *Hartley v. Pehall* (b), said it was a question of some nicety, but he was not called upon to decide it. In *Doe v.*

Reid

(a) *The Duke of Bedford v. The Trustees of the British Museum*, *infra*, page 552.

(b) 1 *Peake N. P. C.* 131.

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v.
BAILEY.

Reid (a), the learned Judges, as far as they handle the question, seem to think that such covenants do not run with the land. Lord *Tenterden* apparently guards himself against being supposed to hold that they do; and Mr. Justice *Bayley*, upon the question, whether the covenant did or did not run with the land, expressly says, "I think it would be very difficult to shew that *The Mayor of Congleton v. Pattison* does not govern this case." As the law at present stands, I have no hesitation in saying, that whoever would make sure of the benefit of such a covenant, must provide against assignment without licence, which may enable him to renew the covenant with the assignee of the lease.

A careful examination of the authorities, then, confirms the view which I set out with taking of the subject, upon principle; and shews that there would be considerable difficulty in holding such a covenant as the one in question to run with the land, even if there existed between the original parties to it, the covenantor and covenantee, that privity which the enuring right of reversion creates between the lessor or his assigns and the assigns of the lessee; that the cases, taken altogether and sifted, are adverse to such a covenant being real and inherent, even in that case of privity; but that, where no such privity can be pretended to exist, as in the present instance, the covenant is plainly collateral, and binds not the assignees.

If such would be its construction at law, does the notice which the purchaser had of its existence alter the case in this Court, upon an application for an injunction; or would it, upon the application, of a co-relative and co-extensive nature, for a specific performance?

(a) 10 *B. & Cress.* 849.

ance? Certainly not. The knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorises him to affect by his contracts—had attempted to create a real burthen upon property, which is inconsistent with the nature of that property, and unknown to the principles of the law, cannot bind such assignee by affecting his conscience. If it did, then the illegality would be of no consequence; and however wild the attempt might be to create new kinds of holding and new species of estate, and however repugnant such devices might be to the rules of law, they would prove perfectly successful in the result, because equity would enable their authors to prevail; nay, not only to compass their object, but to obtain a great deal more than they could at law, were their contrivances ever so accordant with strict legal principle. This Court would be occupied in compelling persons by way of injunction and decree, to perform covenants which the law repudiated, and for the breach of which no damages could ever be recovered.

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KERRALL
v.
BAILEY.

A case like this bears no analogy to the ordinary case of a purchase with notice of a prior agreement by the vendor to sell the premises to another. Such a purchaser has done an unconscientious act, or at least made himself accessory to the unconscientious act of his vendor in selling another man's property, and therefore his bargain cannot protect him against the prior claim: but that of which he there had notice was the legal and valid act of the vendor; whereas that of which the assignees here had notice, was their assignor's covenant affecting to bind the land, on which, by law, it could not operate. Observe how this would apply to all assignments of leaseholds. Every assignee of a lease has notice of the lessor's covenants; consequently no covenant, how absurd soever, could be made by a lessee,
that

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that would not of necessity run with the land in equity, into whose hands soever the land might come; and all the decisions that have been made by the Court with respect to such covenants being collateral or in gross, would be of no avail, because, though no damages could be recovered for the breach of them, yet the performance of them could be enforced against every assignee of the term, as a party necessarily fixed with notice. So a person who had conveyed land, and subjected it to covenants in the hands of his vendee, could at once make sure of those burthens following it into the hands of all holders to whom it might pass, by taking the precaution of notifying the covenants in some effectual though easy manner, as by publication in some place near the premises, where the purchaser must needs observe the announcement. This Court will never interfere, by way of injunction, or in any other more direct manner, to enforce such covenants, when satisfied that they could receive no support or countenance at law.

It is clear, therefore, that the case for this injunction fails upon these grounds, either of which is sufficient to support the decision: first, that the agreement was in violation of the provisions and policy of the local act; and, secondly, that the covenant on which the relief is claimed is not binding on the assignees. The injunction must, therefore, be dissolved.

March 12. 18. Subsequently to the making of the order by which the injunction was dissolved, an application was made to the Vice-Chancellor, on behalf of *Richard S. Harford*,
John
 Some of the shareholders having been made co-Plaintiffs in the bill without their privity or consent, on their application an order was made, with costs, that their names should be struck out as Plaintiffs.

John Harford, and *William W. Davis*, three of the shareholders in the *Trevil* Railroad Company, who were named as co-plaintiffs in the suit, that their names might be struck out of the bill as plaintiffs, with costs to be paid by the other plaintiffs or their solicitors. His Honor having refused the application, the motion was now renewed, by way of appeal, before the Lord Chancellor.

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v.
BAILEY.

From the affidavits filed upon the motion, it appeared that, at the general yearly meeting of the shareholders held in *May* 1833, the subject of protecting the interests of the Railroad Company against the threatened encroachments of Messrs. *Bailey* came under consideration, and the probable necessity of resorting to legal measures for that purpose was a good deal discussed; but neither on that occasion, nor afterwards, was the institution of any such measures actually authorised; and a proposal then made that a committee should be appointed, with power to take legal proceedings against persons infringing the rights of the Company was abandoned, after having been opposed by a person who was present as the agent and proxy of Messrs. *Harford* and *Davis*, and who expressly protested that, before any such proceedings should be determined on, a special meeting ought to be called. It further appeared, that Messrs. *Harford* and *Davis* had a similar interest with Messrs. *Bailey* in refusing to comply with the covenants contained in the deed of 1795, and that this interest was well known to the persons present at the general meeting.

Mr. *Pepys*, Mr. *Knight*, and Mr. *Jacob* supported the motion.

Sir *Edward Sugden* and Mr. *Lynch* opposed it.

1884.

 KERRILL
 v.
 BAILEY.
 March 18.

The LORD CHANCELLOR said, that, inasmuch as the Plaintiffs stood in the relation of partners to each other, less evidence certainly would suffice to fix the parties making the application, with having retained the solicitors, or with having authorised the commencement of the suit, than would have been required had they been strangers. The general presumption, however, which would arise in the ordinary case of partners, and would render slighter evidence sufficient, was here repelled by the circumstance, that, with reference to the subject-matter of the suit, Messrs. *Harford and Davis* stood in a peculiar situation, which rendered it in the highest degree unlikely that they should desire the success of these proceedings; for, besides their interest as holders of shares in the railroad, they had works of their own, which gave them the same interest with the Defendants in resisting the Company's claims. That no general authority existed in one partner to bind his co-partners by retaining an attorney, or commencing a suit or an action, was clear. It had not been maintained that there was any case against the three individuals now moving, unless the circumstances should be deemed sufficient to prove a special authority; and it would be strange indeed, if a Chancery suit, or an action at law, were held to form part of the ordinary course of the partnership business, (with respect to which alone partners could bind each other by their acts,) when, unless in the particular and excepted case of proceedings in bankruptcy, and that only by deference to long established usage, (*Ex parte Mitchell* (a),) one partner was unable to bind another by executing a power of attorney, or by a submission of disputed claims to arbitration. The judgment below had not been rested upon any such grounds; nor did any case in any court, certainly not

Holkirk

(a) 14 Ves. 597.

Holkirk v. Holkirk (a), give the least countenance to so extraordinary a doctrine. But his Honor, regarding the peculiar circumstances in this case, had thought there was enough to shew an authority given by Messrs. *Harford* and *Davis*. In that conclusion his Lordship could not concur; for, after a careful and attentive review of all the facts of the case, no doubt remained on his mind, that the names of these three persons were used without due authority—indeed, contrary to their known desire—by those who were well assured that, had they asked for any such authority, it would certainly have been refused, and who, for that reason, abstained from making the request. Such proceedings were to be regarded with much displeasure. They were extremely improper towards the individuals, and they were highly unbecoming towards the Court. Cases might be put, in which, by such unauthorised and unjustifiable conduct, both the parties whose names were used, and the Court, whose process was abused, might find themselves placed in a situation of considerable embarrassment, and from which, according to any known course of procedure, it would be extremely difficult satisfactorily to escape. The order of the Vice-Chancellor must, therefore, be discharged; and an order made, according to the terms of the motion, for striking out the names of Messrs. *Harford* and Mr. *Davis* as Plaintiffs in the suit.

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KEPFELL
v.
BAILEY.

(a) 4 *Mad.* 50.

1841
1822
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1841
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1841

The DUKE of BEDFORD v. The TRUSTEES
of the BRITISH MUSEUM.*

Where land is conveyed in fee, by deed of feoffment, subject to a perpetual ground-rent, and the feoffee covenants for himself, his heirs and assigns, with the feoffor, the owner of adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands that, with reference

BY a settlement made in the year 1669, on the marriage of the Lady *Rachel Vaughan* with the Honourable *William Russell*, afterwards Lord *Russell*, a messuage called *Southampton House*, and the appurtenances, together with some fields adjoining, situate at *Bloomsbury* in the parish of *St. Giles*, in the county of *Middlesex*, and then the property of Lady *R. Vaughan*, were conveyed to trustees, upon such trusts as she alone should, in manner therein mentioned, appoint.

By indenture of feoffment of the 19th of *June* 1675, made between the Honourable *William Russell* and Lady *Rachel Vaughan*, his wife, of the first part, the trustees of the settlement of the second part, and the Right Honourable *Ralph Montagu* of the third part, it was witnessed, that in consideration of 2600*l.* to the said *William Russell* and his wife paid by the said *Ralph Montagu*, and of the covenants thereafter mentioned, on his part to be performed, and of 5*s.* paid to the trustees (which sums were acknowledged to have been received for the absolute purchase of the piece of ground thereafter mentioned), they the said *William Russell* and his wife, and by their direction and appointment the

* The reporters are indebted for the statement of this case to the kindness of Mr. *Jacob*.

to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a court of equity will not interpose to enforce the covenant, but will leave the parties to law.

Whether upon such a covenant there could be any remedy at law against the assigns of the covenantor, *quære*.

the trustees, granted, bargained, sold, aliened, released, enfeoffed, and confirmed unto the said *Ralph Montagu*, his heirs and assigns, a piece of land lying in a field called *Baber's Field*, in *St. Giles's*, containing seven acres and twenty-five perches, described in a map annexed, and abutting eastward in part upon the messuages lately erected by *Mary Hudson*, and in other part upon other part of *Baber's Field*, northwards on *Baber's Field* aforesaid, westward in part upon the messuage then in the occupation of *John Morris*, and in other part upon *Baber's Field* aforesaid, southward upon *Great Russell Street* in *Bloomsbury* aforesaid; and also the wall encompassing the said parcel of ground; and also five feet and four inches of ground in breadth, extending the whole front of the said ground abutting upon *Great Russell Street*, and lying without the south wall, to be pallisaded, and as a security for the said wall; and also a way and free passage for foot, horses, coaches, carts, and all manner of carriages in, by, through, and over the grounds of the said *William Russell* and *Lady Rachel Vaughan*, then used, or which thereafter should or might be used, in lieu of those that were then used for or as streets in the said parish unto the said piece of ground, or any part thereof, in case there should be any alteration thereof, and other ways belonging to the said premises, or then used with the same; and also free liberty and authority to make or open two doors or passages out of and through the wall on the north part of the premises, and to continue the same; and also full power and free liberty to make all such sewers, water-courses, sinks, gutters, drains, sewers, conveyances for bringing in of water, and other easements as should be fit or necessary for the accommodation of the messuages and outbuildings intended to be built upon the said piece of land, under ground, and southwards unto the said places then used for streets, and unto and

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into the common sewer belonging to the buildings in *Bloomsbury*, commonly called *Southampton Buildings*, and to continue the same, closing up the ground and making up the pavements that should be broken for doing the same; to hold the same to the use of the said *Ralph Montagu*, and his heirs and assigns for ever, subject to a rent of 5*l.* per annum to *Lady R. Vaughan*, her heirs and assigns, which he covenanted to pay, and for the recovery of which a power of distress was given. The deed then contained a covenant to levy a fine, and covenants for title.

In consideration of the premises, *Ralph Montagu* then covenanted with *Lady R. Vaughan*, her heirs, executors, administrators, and assigns, that in case he, his heirs or assigns, should erect any building upon the said ground, or any part thereof, he or they should erect and new-build upon the said piece of ground one fair and large messuage and dwelling-house, fit for him and his family to inhabit, composed of an uniform building, together with all convenient stables, coach-houses, and other out-offices suitable to the said mansion or dwelling-house; and further should also keep fenced in with a brick wall the residue of the said piece of ground, and should make thereout a convenient court yard, and on the back part thereof should leave space sufficient for convenient gardens and walks, and should not make any public or other way out of the said piece of ground unto the fields lying northwards of the same, save only two doors out of the said garden to be made for the accommodation of the inhabitants in the said chief mansion-house for walking into and taking the air in the said fields, nor should erect any public brewhouse on the said piece of ground, nor make any buildings on the said ground, save only convenient offices for the said chief messuage, and ornaments and conveniences for the
 said

said garden, the walls of those to be of brick or stone, and not of timber; and further should pave, and make, repair, and amend the pavement from the outward wall of the said messuage to the middle of the street there, and should fix posts and pales in the street next to the said wall, to range even with the rest of the street; and should not make any watercourse, drain, or sewer out of the said piece of ground backwards northward unto the said field, nor erect any building on the outermost wall of the said ground next to the said field. He further covenanted with Lady *R. Vaughan*, her heirs and assigns, that if he, his heirs or assigns, or any of them, should at any time thereafter erect any buildings, of what nature soever, on the north end of the said piece of ground, and which should extend northward beyond the range and building of *Southampton House*, situate near thereunto, other than one or more summer house or houses, banqueting house or houses, for the accommodation of the garden to be made in the said ground, or what should be for the enlargement of the great mansion-house, or should make, or cause or permit to be made, any watercourse, drain, or sewer out of the said ground, into the said fields backwards northward, or should build or make any public brew-house upon the said piece of ground, then he, his heirs and assigns, should forfeit and pay to the said Lady *R. Vaughan*, her heirs and assigns, *5l.* per day so long as the said building or brewhouse, watercourse, drain, or sewer, should continue, and until the said building or brewhouse should be taken down, and such watercourse, drain, or sewer should be stopped up, and the ground made in the same plight as it was in before the making such watercourse, drain, or sewer. The deed then contained a power of distress for recovering this rent, and, lastly, a covenant on the part of *William Russell* and Lady *R. Vaughan*, that they, or the heirs or assigns of the latter, should not make any drain, watercourse,

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standing ditch, or sewer within 500 feet northward of the wall which encompassed the ground thereby granted, which should be any annoyance or be offensive to the said *Ralph Montagu*, his heirs or assigns, owners of the said ground.

By indentures dated in 1682, new trustees were appointed of the settlement of 1669; and in the year 1685, *William Lord Russell* being dead, the trustees reconveyed the legal estate to *Lady R. Vaughan*, then *Lady Russell*.

In pursuance of the covenants, a mansion-house, with offices, was built by *Montagu* upon the ground conveyed to him; and that mansion-house having been destroyed by fire, another was subsequently erected on the same site. Soon after the establishment of the *British Museum* under the authority of an act of parliament passed in the 26th year of the reign of his Majesty *George II.*, this house and premises, known by the name of *Montagu House*, were purchased, and were vested in trustees for the purposes of that institution.

The estates of *Lady Russell* in *Bloomsbury* had become vested in the Plaintiff in fee, subject to leases of some parts of them; and houses had been erected and streets formed on the north, east, and west sides, adjacent to the Museum, and some of them overlooking the gardens. The yearly rent of 5*l.* was paid to the Plaintiff, who claimed under *Lady Russell*, not by descent, but as a purchaser. The mansion-house, originally called *Southampton House*, and afterwards *Bedford House*, stood formerly on the north side of *Bloomsbury Square*; it was pulled down in the year 1800, to make way for streets and buildings which were erected on its site.

The bill was filed for the purpose of obtaining an injunction to restrain the Defendants, the trustees of the
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British Museum, from proceeding to raise in the gardens certain additional buildings which they had it then in contemplation to erect. The intended additions were designed for the reception of the statues and other monuments of ancient art brought from *Greece* by the Earl of *Elgin*. They were to consist of a wing sixty feet in height, joining the principal building at the eastern extremity, and extending from it into the garden northwards to the distance of two hundred and ninety feet. On the western side a similar wing had been built about the year 1805, extending northwards about one hundred and forty feet; it was designed to lengthen the latter, so as to correspond with that to be built on the east. These wings, if erected, would extend northward considerably beyond what had been the line of the range and building of *Southampton House*.

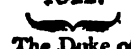
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A motion was made for an injunction before the Vice-Chancellor, Sir *J. Leach*, who ordered a case to be stated for the opinion of a court of law upon the question whether the Plaintiff could maintain an action of covenant to recover damages in respect of the erection of buildings to the northward of the line of *Southampton House*; directing that it should be stated in the case that the covenant in the deed of 1675 was made with the trustees, and the rent reserved to them, and not to Lady *R. Vaughan*.

From this order the Plaintiff appealed, and renewed his motion for an injunction; and as the Defendants were equally dissatisfied with the Vice-Chancellor's order, and had intended also to appeal, it was arranged between the parties that the question should be considered as if it were before the Court upon cross-motions of appeal.

The motion was heard by Lord Chancellor *Eldon*, assisted by Sir *T. Plumer*, the Master of the Rolls.

Mr.

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When parties come for equitable relief by injunction, they are not bound to shew that the agreement or covenant on which their claim is founded is of such a nature that damages might be recovered on it at law. It is unnecessary, therefore, to consider whether the covenant in this deed is one which runs with the land. Whether that be so or not, it is clear that in the circumstances of this particular case, no action could be maintained upon the covenant by the present Plaintiff; for at the time when the covenant was made with Lady *Rachel Vaughan*, her heirs and assigns, she had only an equitable interest in the property, the legal seisin being in the trustees of her marriage settlement; although, if that Lady were now alive, she might in her own person enforce the covenant at law, according to the doctrine laid down in the case of *Stokes v. Russell*.^(b) But against technical objections arising out of a formal defect of this kind, the Court, if the justice of the case required it, would, relieve, as indeed the Vice-Chancellor has done, by directing the covenant to be stated in such a form that the defendants shall not be at liberty to avail themselves of any circumstance which might prevent the question from being fairly raised, and determined at law.

Assuming, however, that no action could be maintained against these Defendants upon the covenant even as the Vice-Chancellor has stated it, the question would still remain, whether so much of plain and manifest intent and agreement is not disclosed upon the face of the instrument

(a) The report of the argument and judgment is abstracted from the short-hand writer's note.

(b) 3 *T. R.* 678.; and see *Webb v. Russell*, *ibid.* 395.

strument that a court of equity ought to interfere, notwithstanding the defects of the covenant in a legal view. A court of equity, in construing agreements, looks to the substantial meaning of the parties, and not merely to the expressions which they have used. In *Morris v. Lessees of Lord Berkeley* (a), Lord Hardwicke, on an application to continue an injunction against building, says, "Whoever comes into this Court on such a right, must found it either on defendant's building so as to stop ancient lights for which he has prescription (notwithstanding that he must lay a particular prescription), or else on some agreement, either proved or reasonable presumption thereof,"—an observation which admits that a person may have a seisin in land, subject to an agreement, restraining him from so using it as to interfere with the beneficial enjoyment of the land of another person. The doctrine as to the agreement running with the land seems therefore to be carried further here than it would be in a court of law. The cases of *Hobson v. Trevor* (b), *Cannel v. Buckle* (c), and *Chilliner v. Chilliner* (d), are authorities, among many others, to shew that, in construing agreements of this description, the Court regards the substance rather than the form of the instrument; and Lord Macclesfield, in the course of his judgment in the two former cases, states distinctly that the proposition there contended for, that where an action for damages cannot be brought at law on an agreement, no suit will lie in equity for a specific performance, is altogether unfounded. The decision in the case of *Martin v. Nutkin* (e), where it was perfectly clear that the agreement, both in its form and substance, was of such a kind that no action could be brought upon it at law, is a strong illustration of the same principle.

Upon

(a) 2 Ves. sen. 453.

(b) 2 P. Wms. 191.

(c) *Ibid.* 245.

(d) 2 Ves. sen. 528.

(e) 2 P. Wms. 266.

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Upon the particular language and provisions of this deed the intent and meaning of the parties are clear and indisputable. The intention was, that a large and handsome mansion, fit for the residence of a nobleman, or gentleman of fortune, and his family, should be built upon the ground, and that the land behind the mansion should be kept as an open garden; that no brewhouse should be erected on any part of it; at all events, no building which should extend beyond the line of *Southampton House* on the north, the object being to keep the area behind *Southampton House* free, and to confine the new mansion of Mr. *Montagu* to the south of the northern line of *Southampton House*. There is an express proviso that no building shall be erected on the land by Mr. *Montagu*, his heirs and assigns, which shall extend northwards beyond the line of *Southampton House*; and a penalty of 3*l.* per day is imposed so long as the agreement shall continue to be broken in that particular.

If these stipulations had been contained, not in a deed, but in a mere agreement, and the parties acting in the confidence that such agreement would not be disturbed had severally performed their parts of it, and had observed its provisions for a long period, this Court would not afterwards permit it to be infringed by either. In like manner, if an absolute conveyance had been made of the land, upon trust to permit part of it to be enjoyed by Mr. *Montagu*, provided he observed the stipulations, the Court would interpose on behalf of the other *cestui que trust*, to restrain any subsequent act of his which was a violation of the trust, although it might be doubtful in whom the legal estate had become vested. The time that has elapsed can make no difference. If Lord and Lady *Russell* could have applied to this Court the day after the deed was executed

executed, to enforce the terms of the agreement specifically, the Plaintiff is equally entitled to do so at the present moment. The exception contained in the proviso with respect to a summer house or banqueting house, or other houses for the accommodation of the garden, or what shall be for the enlargement of the great mansion, can never, in fairness, be applied to such a building as the Defendants have it contemplation to erect. The addition is not intended to be uniform with the original mansion; neither is that mansion and the proposed wing occupied, or intended to be occupied, in the way the contracting parties contemplated—as the residence of a nobleman and his family,—but for a totally different purpose; and it will extend considerably to the north of what was the line of *Southampton House*.

Upon the face of the deed, it appears that houses had been erected on part of the adjacent land; and from the express mention of “streets which might thereafter be built,” it is clear that the erection of other buildings was contemplated. It cannot fairly be inferred, therefore, to have been the intention of Lady *Rachel Vaughan* that the adjacent land not conveyed to Mr. *Montagu* should remain for ever in the state in which it then was; nor can it be maintained that the Plaintiff, and the persons under whom he claims, have been guilty of any breach of good faith in altering that state. All that the deed provides in favour of the feoffee is, that there shall be two exits or passages out of the garden towards the north, by which Mr. *Montagu* and his family were to have liberty to go out and take the air in the fields; and those passages have been preserved to the present day. That is in the nature of a privilege or indulgence to the grantee, and ought not to receive a larger interpretation than the plain import of the words. Such words

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words never could mean to give the *Montagus* a right of way over those fields, or to impose on the *Russell* family the obligation of keeping the fields open for the benefit of the *Montagus* in all time to come.

The *Attorney-General* (Sir R. Gifford), Mr. *Witherell*, Mr. *Puller*, and Mr. *Bligh*, for the Defendants, contended, that the order of the Vice-Chancellor, directing a case to be stated for the opinion of a court of law, was unnecessary and improper, because, independently of the question of legal right, the circumstances of the case were such as to deprive the Plaintiff of any claim to the protection of a court of equity by injunction.

Lord ELDON, C.

I think it right for myself to say I have formed no opinion, nor do I mean to pronounce any opinion, whether any action could or could not be maintained by the Duke of *Bedford* against the trustees of the *British Museum* if they proceed with the proposed building. That is not the subject of this day's consideration. Neither am I disposed to meddle with another question, as to which also I disclaim saying one word judicially—whether now or heretofore the trustees of the *British Museum*, upon any thing that appears in this instrument, could have applied to the Court to restrain the *Bedford* family from doing that which they have done. The point to which I have confined my attention, and upon which I am anxious to have the opinion of the Master of the Rolls, is, taking it for granted that an action could be brought by the Duke of *Bedford* under the deed of 1675, whether, under all the circumstances of this case, his Grace must be content with his legal remedy for the purpose of obtaining compensation for any injury he
 may

may have sustained, or whether he has a right to the better mode of relief which a court of equity affords by injunction.

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When *Bedford Square* was built, it is impossible to doubt that the owners of houses on the east side of that square thought that an increased value attached to them, because the residents in those houses would have the Museum on one side and the square on the other. So with respect to *Gower Street*, every one remembers that the houses on the east side were always advertised as much more valuable than those on the west; and why? Because from the former there was a prospect of the country, extending to *Islington*, and because also their inhabitants could have a refreshing walk from their own homes through the fields as far as *Queen Square*, which was then the northern extremity of that part of the metropolis. It was no doubt imagined that the Duke of *Bedford* could never be advised to cover this land with buildings, and that all the property between *Gower Street* and what is called *Brunswick Square* would remain open as long as the leases of the houses in *Gower Street* should endure; nor was it to be expected that if the Duke of *Bedford* had a right to tell the trustees of the *British Museum* that they should not build further without his consent, the tenants on the east side of *Bedford Square* might not ask of his Grace to insist upon that right for their sakes.

This subject may be illustrated by what has happened with respect to *Gower Street*. From time to time buildings were raised by the lessees in that street contrary to the covenants in their leases, but with the consent of the Duke of *Bedford*, until the covenant against the tenant erecting buildings behind his house became, with reference to the situation of his neighbours, an oppressive, though
not

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not an unjust restriction. Suppose, for example, there were ninety houses on the east side of *Gower Street*, and the Duke had allowed the tenants of eighty of them to raise their back buildings to a height extremely inconvenient to the others from whom he withheld that permission, it could not be said that he was acting illegally or improperly in so doing; but it becomes quite a different question, if, under such circumstances, he files a bill to prevent those others from raising their washhouses or outbuildings. If such a bill were filed, it is questionable whether the Court would not say it was clear, from all the circumstances, that each of those tenants thought he was entitled to the benefit which his Grace, by declining to enforce the covenant, had allowed to the rest. The question, therefore, is, not whether the party can bring an action, but whether he can come into equity for relief, and thereby render an action for compensation unnecessary—whether, under all the circumstances of the case, the Duke of *Bedford* can be heard to say “I can or I cannot maintain an action at law; but be that as it may, I will not seek relief in that mode, but will come into a court of equity, and insist upon having the extraordinary relief which that court gives beyond what is afforded by courts of law. I will have an injunction, to prevent the necessity of my consulting any law courts whatever as to my relative situation with regard to these trustees.”

Consider how the matter stands upon the deed of 1675. It appears that, from the year 1675 to the year 1800, buildings in the neighbourhood of *Bedford House* have been erected to the eastward; that there has been a prolongation of streets from *Bedford House* to the *New Road*, and that buildings also have been erected on the westward through *Bedford Square*; that there were no buildings at all in the space between *Brunswick Square*

Square and Gower Street, but that the large mansion, to which the terms of this instrument refer, and which now forms the *Museum*, had stood upon its present site up to the year 1800. The deed is for considerations, partly pecuniary and partly to be found in covenants; the pecuniary considerations being 2600*l.* and a rent of 5*l.* a year, and the covenants contained in that instrument being expressly stated to be part of the consideration. A grant is then made, and (what is not immaterial) in the description of the premises it appears that all the time the grant was made there was, at least, one messuage on the east side of *Montagu House*, one messuage on the west side, but no messuages whatever on the north side. There is, further, the usual covenant to pay the rent, and then follows this covenant: — “ And in consideration of the premises, the said *Ralph Montagu*, for himself, his heirs, executors, administrators, and assigns, covenants, promises, and grants, to and with the said Lady *Rachel Vaughan*, her heirs, executors, administrators, and assigns, that in case the said *Ralph Montagu*, his heirs or assigns, shall erect any building upon the said ground and premises, or any part thereof, he, the said *Ralph Montagu*, his heirs or assigns, shall and will erect and new-build upon the said piece of ground hereby granted, or mentioned to be granted, one fair and large messuage and dwelling-house.” The construction put upon these words is not only a construction to be found in a subsequent part of this instrument, but is the construction which the Duke of *Bedford* himself gives to it, namely, that the grantee is to build a chief messuage fit for the dwelling-house of a large and noble family, with the necessary conveniences and ornamental appendages. The instrument goes on to covenant, that the house is to be fit for the said *Ralph Montagu* and his family to inhabit, composed of an uniform building, together with

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all convenient stables, coach-houses, and other offices suitable to the said mansion or dwelling-house; and, further, that the said *Ralph Montagu, &c.*, shall keep fenced in with a brick wall the residue of the said piece of ground, and shall make thereout a convenient court yard, and, on the back part thereof, shall leave space sufficient for convenient gardens and walks, and shall not make any public or other way out of the said piece of ground into the fields lying northwards of the same, save only two doors out of the same garden, to be made for the accommodation of the inhabitants of the said chief mansion-house for walking into and taking the air of the said fields, which fields are before stated to be on the north side of the house. So that the grantee is to have two doors towards the north, which was open ground, but not on the east or the west, nor is he to erect any buildings on the ground save only for convenient offices for the chief messuage, and ornaments and conveniences for the garden, “the walls of those to be of brick or stone, and not of timber;” and, further, it is covenanted, that he and they shall not make any water-course, drain, or sewer out of the said piece of ground backwards northward into the said fields, nor erect any buildings on the outermost wall of the said ground next to the said field:—all this again shewing care and attention to what was, or what was not, to be done northward, and carrying that care to this extent that the grantee was not to raise any structure upon the wall to the northward of the garden.

Now in determining how a court of equity ought to proceed, it is proper to consider not only what would be done in the actual matter before it, but what the court would do in other cases falling within the same principle. Suppose that after *Mr. Montagu* had built this house ranging with all the surrounding buildings that belonged to

to the Duke of *Bedford*, and ranging with *Powis House* and other large mansions standing in *Great Russell Street*; suppose that after the summer house and banqueting house had been erected (which clearly would not have affected the prospect from *Bedford House*), and after the garden wall (on which the feoffee was not to place three additional bricks) had been built, the Duke of *Bedford* had said "there is nothing to restrain me; I will place a sugar house on one side and a soap house or gas works on the other side;" or rather, suppose, which is a handsomer way of putting it, that the Duke had built a row of houses close to the wall, and afterwards Mr. *Montagu* had said he did not like to have his gardens overlooked by his neighbours' servants, and he would therefore, notwithstanding the covenant, build this wall twice as high as it was before; though I admit that the Duke of *Bedford* might have had a proper ground of action, would this Court have granted an injunction? My answer is, no: for, upon looking to authority, I find the law to be as Lord *Kenyon* has laid it down. If this deed is permitted to be urged against what I must call, not the legal, but the actual intention of the parties, and if you have the means of obtaining any remedy, you may have recourse to your deed; but you cannot under such circumstances come into a court of equity for a remedy which the court never grants except in cases where it would be strictly equitable to grant it. It is impossible to state, as the doctrine of a court of equity, that the Court will carry into execution a specific covenant in all cases where the legal intention of the deed is found. A doctrine like that would be widely inconsistent with general practice, and would directly contradict the daily and hourly experience of us all.

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The deed proceeds further, and states as a distinct covenant that if the said *Ralph Montagu*, his heirs or

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assigns; or any of them, shall at any time thereafter erect any building of what nature soever on the north end of the said piece of ground, and which shall extend northward beyond the range and building of *Southampton House*, situate near thereunto, other than one or more summer house or other houses for the accommodation of the garden, he and they shall forfeit and pay &c.— Now what would it have signified as between these parties, in the consideration of such a case as this, whether a house was or was not built in the range of *Southampton House*, if there were placed between this house and *Southampton House* three or four streets excluding the smallest possible view from *Southampton House* of any thing north of this mansion, and by the acts of the *Bedford* family themselves destroying the very purpose for which this covenant was here inserted?

Suppose again that the moment after Mr. *Montagu* had, in discharge of the original engagement built this great mansion fit for the pleasurable residence of a nobleman or gentleman of fortune, and had also according to the covenants erected suitable offices and the ornamental banqueting house and summer house, the Duke of *Bedford* had then put a public brewhouse in the vicinity of the garden, what would the *Montagu* family have said? And yet there is nothing here from which it can be pretended that there is an express prohibition of such a proceeding. Neither do I say whether the *Bedford* family could have built a public brew-house to the north of this mansion; but suppose such a thing had been done, and the Duke of *Montagu* had then said, "You have spoilt my banqueting house and summer house unless I am to drink nothing but porter; I must therefore build a wall which will likewise prevent the smoke of the engines of the brewhouse coming from the north." Will it be contended that in such a case the

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Bedford family could come to a court of equity for protection on the ground that the Duke of *Montagu* was going to build a wall higher than the covenants permitted, or even, we will suppose, an immense brewhouse, they having on their part religiously kept their covenant by making two archways through which his grace might go and take the salubrious air which it was intended he should have?

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If the parties have so dealt with regard to the legal rights, that the object of the one party is defeated, is the other to do what he pleases, while the first is not at liberty to call upon that other to account for doing that which he himself is by the deed prohibited from doing? I do not think that a court of equity is to act by reciprocity of covenant; I rather mistake what has been held to be the doctrine of courts of equity during the whole course and practice of my life, if this Court does not say to parties who are so circumstanced, "Confine yourselves to your legal remedies if you have any, and do not come here in cases of this description to ask of the Court to give you more relief than could be obtained in a court of law."

Upon this point I am anxious to have the opinion of the Master of the Rolls, first making most respectfully this single observation, upon a subject which calls for vigilant attention, that if there be a question in a court of equity, the decision of which will render the consideration of it in courts of law unnecessary, it is then the duty of the court of equity first to decide that question. If, for example, it should happen in this case, that after the parties had gone to trial, and the Defendant had obtained a verdict at law, this Court would nevertheless have given no relief; then it is for the interest of of the suitors that they should be told so

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**The Duke of
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 v.
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 Museum.**

in the first instance, and not in the last stage of the proceedings. Why is the Court to send them to law, and afterwards to tell them when they come back that nothing can be done for them here? If that is to be the course, it is better to dismiss them out of Court at once and in the first instance, let the result of the application to a court of law be what it may.

I do confess myself unable to say that this is one of the cases in which the Court ought to give relief by injunction. The difficulties I have stated are difficulties I am unable to get over, and I state them without prejudice. Having done so, I must request the Master of the Rolls to state what view he has taken of the case.

Sir T. Plumer, M. R.

The single question now before the Court is one which respects the exercise of the jurisdiction; and this Court, while it determines that question upon principles peculiar to itself, cautiously abstains from deciding whether either party has a remedy at law against the other, leaving each of them, as, in my opinion, it ought to leave them, to agitate that question in a court of law.

Now, if this were a case in which the Plaintiff had not a legal, but had only an equitable remedy, as was attempted to be argued by his counsel, on the assumption that, by reason of certain technical forms, he was debarred from obtaining any redress at law; if the case was reduced to that point, it would become extremely material to consider whether the party had any claim at all to come into a court of equity for its equitable assistance. That, however, is not the present question. On the contrary, those who support the application for the injunction also insist that the Duke of *Bedford* has a clear legal right; that upon the true construction of the

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the contract, and upon all that has happened between the parties, it is competent to the Duke, as representing the original vendor, to assert his legal right. Undoubtedly it is perfectly open to him to take that course; and nothing which this Court shall determine will, in the least, abridge his right.

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The Duke of
Borough
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of the Barrow
Moor.

Again, in considering whether the Plaintiff is precluded from having the equitable assistance of this Court, it must not be supposed that the slightest imputation is cast upon his conduct. It is not on the ground that the party applying for relief has conducted himself improperly—so contrary to the agreement as to deprive himself of that remedy, that the assistance by injunction may be refused; but the question is, whether, from the altered state of the property, altered by the acts of the party himself, he has not thereby voluntarily waived and abandoned all that control which was applicable to the property in its former state. It was perfectly competent to the Plaintiff to make what use he pleased of his contiguous lands; he was not fettered in so doing by any previous obligation to the contrary; and when he took upon himself to act in the manner in which he has acted, and to cover the vacant ground with buildings, the question is, whether, having regard to the mutual dealings between the parties with respect to the property as it stood both originally and afterwards, it is consonant with the principles of equity to interpose at this time of day.

In that point of view, it appears to be a consideration of great importance, more especially with reference to property in the metropolis, how far parties shall now be permitted to go back, and revive all the objections arising out of long antecedent covenants and engagements, and to give them such an application to the

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 Bedford
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buildings of the metropolis in its present rapidly increasing state, that, while one party is left at liberty to obtain the most profitable consideration for his land, every obligation which is in the nature of restriction shall be enforced by that party as against the owner of the adjoining land. The question is not to be determined on the letter of the contract. By the letter of the contract, the Duke is under no positive engagement to leave the northern boundary open; but the question is, whether, according to good faith and the true understanding of the parties at the time when this contract was entered into, the terms of the engagement had not reference to the property while it remained in its then state. There were, here, two large mansions—one erected, the other to be erected, contiguous to each other;—to be enjoyed by two noble families, with their appendages of gardens and offices; and the question is, whether the obligation did not remain so long as those two mansions remained, the parties mutually contemplating all the enjoyment to be derived from every thing which could contribute reciprocally to their beauty, ornament, and use.

It is to be recollected that the piece of ground in question was bought for the very purpose; and it is an obligation cast upon the purchaser, if he builds at all, that he shall erect one mansion only,—one large fair mansion, with suitable gardens and offices attached to it,—his understanding being that he should have all the advantages which the site then possessed; unless, indeed, it is to be presumed that he could undertake to erect a mansion in such a situation, and on so magnificent a scale, with all the obligations thrown upon himself, and none on the contrary, expressed or implied, imposed upon the other party who had subjected him to those obligations.

This

This understanding between the parties results from every part of the agreement. The party whom the Duke represents covenants that Mr. *Montagu* shall have the unlimited enjoyment of the property conveyed, with all that belonged to it. It is quite evident, from the expression with respect to the opening into the fields, that it was in the contemplation of the parties that the land to the north should remain fields or open ground; and in the parts of the deed referring to the streets to the southward and the contiguous buildings to the east and west, there is not a syllable which indicates an intention that the northern boundary was not to remain open. It was that which principally induced Mr. *Montagu* to build. If the subject-matter of the contract is changed, if, from the alterations which take place in the lapse of time, both noble families quit their residences, and the mansion which had been built ceases to be a place of residence for a family of this description, and becomes appropriated to other purposes, a new set of interests and rights would be applicable to it in its altered state. Who is it that has created this alteration? The party who now seeks to enforce the obligation which applied to the property in its former state. It was perfectly competent to the Duke of *Bedford* to build to the northward all the streets he has built, and to surround and enclose *Montagu House* with buildings for trade and commerce, or in any way he thought proper; but, having so done, can it be said to be equitable or consonant with justice, after having induced a man to build a suitable mansion, after having surrounded him with buildings and blocked up all that tempted him to build, and precluded him from the pleasurable or profitable enjoyment of his mansion, to insist on its remaining in the state in which, by the letter of the deed, the party is bound to preserve it? At law such conduct may be no defence. Notwithstanding

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Bedfordv.
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of the Barrow
Mansion.

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standing his having altered the state of the property, the Duke may still be entitled to the benefit of the covenant, and if so, let him take his legal remedy; but the question is, whether a court of equity must not consider how far it is reasonable to permit a party who has so dealt with the property, and so altered its condition, to obtain his remedy by the interposition of this Court.

The case made by the bill, therefore, is not that which was contemplated by the deed. The case made by the bill is, that this erection will obstruct the view of the lessees of the new houses which have been built on the adjoining land. Was that the design of the obligation? The very circumstance of the *Bedford* family having surrounded *Montagu House* with streets and buildings, after having become parties to this contract, (the intention being, that the two contiguous mansions should be inhabited by noble families,) is made the ground on which the equitable relief is sought, because, otherwise, it is said, these lessees will be prevented from enjoying the view into the gardens and grounds of the Museum. Would not that be to apply all the covenants of the deed to a different state of things from that which was the object and design of both parties?

The question then is, whether a court of equity is bound to assist a party to do that which neither party contemplated, and whether it would not be inequitable, unreasonable, and unjust to enforce the covenants specifically in the existing state of the property; and considering it in that view, I entertain a strong opinion that this is not a case in which the Court ought to interfere.

Upon

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Upon these grounds, therefore, and without the least imputation upon the Duke or those who advised him, I think he has voluntarily brought the property into a state which makes this part of the agreement no longer applicable, or which at least renders it unreasonable that the covenant should be enforced.

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of the British
Museum.

At the close of the judgment, the Plaintiff's counsel stated that, as the sole object of the Duke of *Bedford*, in instituting the suit, was to obtain the opinion of the Court upon the question of right, it became unnecessary to prosecute the cause further. An order was accordingly taken, by arrangement between the parties, dismissing the bill.

1833.

Rolls.

1855.

Nov. 18.

1854.

Nov. 18. 21.

A testator gave the residue of his estate to trustees, positively forbidding them to diminish the capital thereof, or that the interest and profit arising be applied to any other use or uses than thereafter directed; and he proceeded to direct one moiety of the income to be applied to a charitable purpose which failed; and the other moiety to be applied to other specified charitable purposes. Held, upon appeal, that the Court had jurisdiction to apply *cyprès* the income of the moiety devoted to the charitable purpose which failed.

ATTORNEY-GENERAL v. The IRONMONGERS' COMPANY.

THE residuary clause of the will of *Thomas Betton*, which was dated in *February* 1723, was as follows:—“I give and bequeath the rest, residue, and remainder of my estate, wheresoever and whatsoever, to the Worshipful Company or Corporation of Ironmongers of the City of *London*, and to their successors, making them my executors upon this special trust and confidence in them reposed, that is to say, that they do, with all convenient speed that may be after my decease, place my estate out at interest upon good securities, positively forbidding them to diminish the capital sum by giving away any part thereof, or that the interest and profit arising be applied to any other use or uses than herein-after mentioned and directed; viz. that they do pay one full half part of the said interest and profit of my whole estate, yearly and every year for ever, unto the redemption of *British* slaves in *Turkey* or *Barbary*, one full fourth part of the said interest and profit, yearly and every year for ever, unto charity schools in the city and suburbs of *London*, where the education is according to the church of *England*, in which number that in this parish is to be always included, and not giving to any one above 20*l.* a year. And in consideration of the said Ironmongers' Company's care and pains in the execution of this my will, the other fourth part of the said interest and profit, yearly and every year for ever, to the uses following; viz. 10*l.* a year to such minister of the church of *England* as they shall from time to time entertain in their aforesaid hospital for performing divine worship and

and other duties belonging to that holy order; the remains unto necessitated decayed freemen of the said company, their widows and children, not exceeding 10*l.* a year to any family; but first deducting and paying quarterly out of this last-named fourth part of the interest and profit 100*l.* a year in discharge of the annuity given to my kinswoman, Mrs. *Eleanor Smith*, during the term of her natural life; and also, always reserving sufficient for keeping my tomb in good repair."

1838.
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It appeared by the Master's report, made in pursuance of the decree upon this information, that a large fund had accumulated from the unapplied portion of the moiety of the income of the testator's estate, which was, by his will, directed to be applied to the redemption of *British* slaves in *Turkey* or *Barbary*, few objects of the charity having been found during the last century. The Master had approved of a scheme given in by the Defendants, by which it was proposed that a sum of 7000*l.* should be set apart out of the accumulated fund, for the purpose of redeeming such objects of the original charity as might still from time to time be discovered, and that the remainder of the accumulations, and the future annual income should be applied to the other charitable purposes mentioned in the testator's will. A scheme submitted by the relators, and rejected by the Master, had for its object the application of the surplus income and accumulations to the purposes of education only. Objections were taken, on the part of the relators, to the Master's report, upon which it was agreed to take the opinion of the Court, without filing exceptions. When the information came on to be heard for further directions upon the Master's report, it was suggested by the Master of the Rolls, that it might be a question, whether this was not a case in which the Crown was entitled to dispose of the fund by sign manual; and, if the Court should

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should be of opinion that the fund ought not to be disposed of by the King's sign manual, a further question might arise, whether the Court had jurisdiction to apply the fund to other purposes than those expressly pointed out by the testator, and whether it might not be necessary to apply for the aid of the legislature in that respect. The cause was directed to stand over to be argued on those points.

*The Attorney-General**, on the part of the Crown, now stated, that he had looked into the cases on this subject, and he felt that he could not successfully argue that this was a case in which the fund in question ought to be disposed of by the king's sign manual. The charitable purpose to which the fund was devoted had not wholly failed; it appeared that it still occasionally happened that *British* subjects were made captives on the coast of *Africa*, and it was impossible to say how far, by a *Turkish* war or otherwise, the number of persons who might become objects of the testator's charitable purpose might be increased. If a fund were not immediately applicable to a charitable purpose expressed by a testator, it did not follow that it might not, at a future time, become applicable; and the jurisdiction of the Court remained as to the administration of the fund, whether it thought proper to retain the fund until it should become applicable to the expressed object of the testator, or to apply it to purposes approximating as nearly

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* At the hearing on further directions, Mr. *Wray* appeared for the Attorney-General, by whom the information was filed on behalf of the charity, at the instance of the relators, and it was submitted to the Court, whether it would not be ne-

cessary to make the Solicitor-General a party to the suit, as the Attorney-General could not argue both for the crown and in support of the information, but his Honor considered that proceeding unnecessary.

as might be to that expressed object. In the *Attorney-General v. The Bishop of Chester* (a), a legacy given towards establishing a bishop in *America* was held not to be void, though no bishop was yet appointed, and the money was retained in Court till it should be seen whether any such appointment should take place. Ultimately, the legacy became applicable to the purpose expressed by the testator, upon the appointment of a bishop of *Canada*, and it was applied accordingly.

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OF
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INDEMNITY
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Mr. *Pemberton*, for the relators, said he was ready to support the scheme which had been submitted by the relators to the Master, as one of greater general utility, and better calculated to give effect to the intentions of the testator, than the scheme adopted by the Master: but he had no interest in opposing an application to parliament, if the Court should be of opinion that such a proceeding was indispensable.

Mr. *Wray*, for the Attorney-General.

Mr. *Bickersteth*, for the Defendants, submitted that the Court had jurisdiction to apply the surplus to the purposes specified in the scheme approved by the Master. Those purposes were perfectly consistent with the general charitable intentions of the testator, for they were the very purposes to which he had devoted the other moiety of his property, and to which it might reasonably be presumed that he would have been desirous of applying the surplus, had he foreseen that the redemption of *British* slaves in *Turkey* and *Barbary* was an object to which he had devoted too large a portion of his bounty. The distinction was, that where property was left for charity generally, or where the charitable purpose of the

testator

(a) 1 Bro. C. C. 444.

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testator was so vaguely expressed as to be incapable of receiving any definite construction, or where the charitable purpose failed and no trustees were appointed, the property was to be disposed of by the king's sign manual; but where, in such cases, trustees were appointed, the property was to be administered *cypres* by this Court. In *Moggridge v. Thackwell* (a), Lord Eldon observed, that "it is very difficult to raise a solid distinction between an original gift absolutely indefinite and without qualification, and a case in which, by matter *ex post facto*, the gift stands before the Court in consequence of that accident, as if it had been originally given indefinitely, without any means for carrying it into execution prescribed." The result, however, of an elaborate examination of all the authorities made by that learned Judge was, that (b) "the general principle most reconcileable to the cases is, that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual; but where the execution is to be by a trustee with general or some objects pointed out, there the Court will take the administration of the trust." The distinction taken by Lord Eldon in *Moggridge v. Thackwell* had been acted upon in the recent cases of *Simon v. Barber* (c), and *Hayter v. Trego*. (d)

The MASTER of the ROLLS.

This testator has directed that the income of his property be applied to the uses after stated in his will, and to no other use; and by his will he gives one half part of the income of his property for the redemption of British slaves in Turkey or Barbary. The altered circumstances of those countries leave at present little or

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(a) 7 Ves. 83.

(b) 7 Ves. 86.

(c) 5 Russ. 112.

(d) *Ibid.* 113.

no demand for this bounty of the testator, and the consideration is what is now to become of this unappropriated property. The jurisdiction of courts of equity with respect to charitable bequests is derived from their authority to carry into execution the trusts of any will or other instrument, and the Court is to proceed according to the intention expressed in the will or instrument. Here the testator wills that one moiety of the income of his property shall be applied to the redemption of *British* slaves in *Turkey* or *Barbary*, and to no other use. If this Court were to take upon itself to apply the moiety of the testator's property in question to any other use, it would not be executing the expressed intention of the testator, but would be acting in direct opposition to that intention. I cannot, therefore, assume a jurisdiction to devote this property to any other purpose, although it is extremely fit that some beneficial use should now be made of it. But it appears to me that this can only be effected by the supreme power of the legislature, and that I must refer it to the Master to approve of a scheme for the future application of this property to be submitted to the consideration of the legislature, and the Attorney-General and the parties interested in the disposition of the other half of the testator's state are to attend the Master upon the reference as to such scheme.

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The Ironmongers' Company presented a petition of appeal against his Honor's decree.


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Sir *E. Sugden* and Mr. *Duckworth*, for the appeal, said that the late Master of the Rolls, in referring it to the Master to inquire and state what act of parliament would be necessary for carrying this charity into effect, proceeded upon an erroneous construction of the will.

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His

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His Honor considered that the introductory sentence directing the interest of the fund to be applied to no other uses than thereafter mentioned, was tantamount to an express prohibition, with reference to a moiety of the income, against its application to any other object than the one particularly specified; namely, the redemption of *British* slaves in *Turkey* or *Barbary*. That sentence, however, evidently overrode the whole of the will, and applied equally to all the charitable dispositions contained in it. If, therefore, the entire income of the charity fund were distributed among the four objects which the testator had designated, or among such of them as were still in existence, the direction that it should be applied to no other uses than thereafter mentioned, was strictly complied with, in whatever proportions the distribution might be made. Indeed, every express gift in favour of particular objects, involved a necessary implication that the fund should be applied to no other purpose. The decree besides was manifestly inconsistent with itself; for such a state of circumstances as his Honor appeared to have assumed could not possibly arise. No part of the property was without a legal owner; the whole was vested in the company as trustees, and was distinctly dedicated to charity. It followed, of necessity, that the right to administer the fund rested with the Court itself; and if that were so, upon what conceivable principle could the Court abandon the jurisdiction and call in the legislature to its aid? The only instances in which applications had been made to parliament for the regulation of charities had been, not where there was a failure of the original objects of the charity, or for the purpose of sanctioning an application to new objects, but where it was desirable to extend or alter the administrative powers given by the founder to the trustees. The execution of this charity, therefore, belonged entirely and
 exclusively

exclusively to the Court; and if from the altered circumstances of the times it had become impossible to give effect to the whole of the testator's benevolent intentions *in specie*, the Court would endeavour to execute the charity *cyprès*. *The Attorney-General v. The Mayor of London* (a), *The Attorney-General v. Andrew*. (b) Where, therefore, of several objects designated, some had failed, the surplus income no longer required for them would be applied to the remaining objects, upon the natural presumption that the intention of the founder himself would be thereby most strictly followed, the provisions of the will furnishing in this respect the safest exposition of his wishes. The Court proceeded upon that principle in the unreported case of *The Attorney-General v. The Bishop of Landaff* (c), where a testator having bequeathed certain sums out of his fortune for the foundation of scholarships in the two universities, and directed the residue to be employed, as in the present case, in the redemption of *British* captives in *Turkey* or *Barbary*, and it appeared that there were none to redeem, the Court directed the liberated fund to be applied towards the augmenting of the scholarships.

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If, however, the Master of the Rolls came to a correct decision upon the construction of the will, if the charity, as to a moiety of the fund, had altogether failed, so that there no longer existed any charitable trust which the Court could execute, or any person who was entitled to claim the fund beneficially, the fund itself belonged to that extent to the *Ironmongers' Company* for their own use. The property was vested in them as trustees; and when the trusts which attached upon it ceased,

(a) 3 Bro. C. C. 171.

(c) *March* 9th, 1819.

(b) 3 Ves. 633.; and *Andrew v. Trinity Hall*, 9 Ves. 525.

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ceased, the beneficial ownership of course remained in the trustees, against whom the crown could maintain no title; and the trustees were willing that the income should be applied according to the scheme approved by the Master.

The Solicitor-General (Mr. Rolfe) and Mr. Wray, who appeared for the Crown, admitted that, upon the authority of Lord Eldon in *Moggridge v. Thackwell* (a), it was impossible to contend that the fund in question had become vested in the Crown, so as to be disposable for charitable purposes under the sign manual.

Sir W. Horne, Mr. O. Anderdon, and Mr. Bethell, in support of the decree, submitted that the construction put upon the will by the *Ironmongers' Company* could only be upheld by striking out the prohibitory clause in the will altogether. It was incorrect to say that the Court had disclaimed the jurisdiction; so far, otherwise, the very reference to the Master, directing him to consider and report what act of parliament might be requisite, was an implied assertion and recognition of the jurisdiction, although the Court at the same time thought that the application of the fund to new objects, and especially to objects which, if his Honor's construction was right, were expressly excluded by the language of the testator, ought to be made under the sanction of the legislature. There was neither principle nor authority to shew that the resort to parliament for such a purpose was unjustifiable or improper. The case referred to, of *The Attorney-General v. The Bishop of Llandaff*, had little bearing on the question; for not only was the decree in that case made without opposition, and by arrangement between the parties, but the fund,

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(a) 7 Ves. 36.

of which the new distribution was directed among the other charitable objects specified, was a mere residuary bequest, by the will itself made subject to the payments in favour of those very objects.

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The LORD CHANCELLOR, after stating the case, proceeded as follows : —

Nov. 21.

The question which the appeal raises is this : — Was the Court entitled, upon the construction of the will, to repudiate the jurisdiction ? But another view has been first of all taken by the relators' counsel ; they deny that his Honor did repudiate the jurisdiction ; they say he sustained it, entertaining the question, and referring it to the Master to settle a scheme for a private act of parliament.

I cannot at all take this view of the decree ; the declaration is express, that the Court has no jurisdiction to apply the fund otherwise than to the redemption of *British* slaves ; and as there are none such to redeem, the declaration is, that the fund shall have no application until a new and improbable state of things arises. It is said that this is only a suspension of the fund ; but the question is (and that comes under the general argument on the construction), whether or not the will authorises the Court to apply the fund to other objects than the redemption of slaves ; which his Honor's declaration negatives entirely.

As for the reference to the Master to approve of a scheme for an act of parliament, I do not profess to understand how that alters the import of the declaration. His Honor declares that at present the Court has no jurisdiction, and desires a bill to be presented to parlia-

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ment for the purpose of obtaining powers, which he considers the Court not now to possess. It would be hard to conceive a more complete denial of the Court's jurisdiction than this course: the meaning of it is plain, that, as the law now stands, the Court has no jurisdiction to apply the fund except in redemption of slaves, and will never have any such jurisdiction until the law is altered. There is no foundation for that proposition, nor has this Court any thing to do with directing bills to be brought in for the purpose of extending its power to objects of bounty not named in the will, nor in the testator's contemplation.

We come then to the only question here raised, and that is upon the construction of the will.

When a testator gives one charitable fund to three several classes of objects, unless he excludes by most express provisions the application of one portion to the purpose to which the others are destined, it is clear that the Court may thus execute his intention in the event of an impossibility of applying that portion to its original destination. The character of charity is impressed on the whole fund; there is good sense in presuming that, had the testator known that one object was to fail, he would have given its appropriated fund to the increase of the funds destined to the other objects of his bounty; and there is convenience in acting as he would himself have done. This is the foundation of the doctrine of *cyprès*.

The unreported case, with which I have been furnished, of *The Attorney-General v. The Bishop of Llandaff*, resembles the present in many particulars. It arose upon Lord *Craven's* will in 1647, which gave part of his property to endow scholarships at the two Universities,

sities, and the residue to redeem *British* captives, exactly as this will does. Upon a reference to the Master, it was found that there were none to redeem; and a scheme, being approved, was sanctioned by the Court, for using all this fund, except a moderate portion set apart in case captives should be made, and applying the residue to increase the number and income of the scholars. Nothing can be conceived more like than that case to this; the only difference, indeed, being that there are said to be, here, words of exclusion. Let us then see if this be so.

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I should have been disposed to favour the relators' argument, on which the decree must rest, had the will been that one half should be employed in redeeming captives, and in no other way whatever; or that the two fourths should be employed in the other charities, and no more than these two fourths in those or any such charities. But that is far from being the case; the testator says, "The capital shall not be diminished by giving away any part thereof, and the interest shall not be applied to any other use or uses than those herein-after mentioned." The object of this general prohibition plainly is to secure the whole fund, principal and interest, to charitable uses; to forbid any alienation of the capital, and any diversion of the income to any other purposes than those which he specifies. The expression "use or uses," even literally taken, lets in all the charities specified, provided the fund be given among them, and not otherwise applied. Undoubtedly the funds must be applied in the proportions specified; one half to one, and one fourth to each of the two other objects; and it would be a breach of trust to give part of the moiety to either of the two other purposes as long as there remained captives to redeem. But, then, it would be just as much a breach of trust without the

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prohibitory clause as with it. If I bequeath 100*l.* to *A.*, and 50*l.* to each of two other persons, *B.* and *C.*, my will is broken if my executor gives *B.* and *C.* more than 50*l.* each, taking the excess out of *A.*'s 100*l.*; but it is not the more broken because I use words of superfluity, and say, "I bequeath 200*l.* as follows, and to no other use or uses." So, here, the prohibition is merely superfluous, and has no greater operation in preventing an appropriation of the fund in proportions different from those specified, than if the prohibition had been entirely omitted; *expressio eorum quæ tacitè insunt nihil operatur.*

So, in the case of a charity, where I bequeath 100*l.* to one object, and 50*l.* each to two other objects of bounty, my trustees violate their duty if they give less than 100*l.* to the one, and more than 50*l.* to each of the other two; and that, whether I use words of exclusion, such as "no otherwise," "no other charities," &c., or omit to use them. But when the one object fails, the doctrine of *cyprès* becomes applicable, although it has no place in legacies to individuals; and the intention to which the Court is to approximate will be gathered from the other gifts, and from the gift itself. Should words be used which positively exclude such an approximation, — as, for instance, if there be an express direction that each of the charities named shall have so much, and neither more, nor less, and one shall not be extended in case the objects of another fail, — then, clearly, the doctrine can have no place; but that is because the will of the testator has expressly said so; and by acting against his clear intent, the Court would not be executing *cyprès* (as near as possible), but departing as far as possible from that intent. This cannot be said of the general words used here, which are abundantly satisfied if no part of the capital is given away at all, and no
 part

part of the interest to any other than the specified purposes. Nor is the will at all violated by applying the undisposed and undisposable surplus of one branch to increase the objects of the other branches of the same charity.

1894.

 ATTORNEY-
 GENERAL
 v.
 The
 IRONMONGERS'
 Company.

The decree must, therefore, be altered as regards the declaration and the reference to approve of a scheme to be submitted to parliament; and instead of that, the declaration is, that the Court has jurisdiction to apply the surplus income of the moiety of the charity property in question in the cause, and the accumulations thereof, as near as may be to the intentions of the testator; having regard to the bequest touching *British* captives, and also to the other charitable bequests in the will; and refer it back to the Master to approve a proper scheme for such application.

1833.

ROLLS.

1833.

Nov. 9,

L. C.

1834.

May 23,

24. 27.

Nov. 21.

It is not maintenance to purchase an interest which is the subject of a suit; but if the purchaser give an indemnity against all costs that have been or may be incurred by the seller in the prosecution of the suit, the transaction amounts to maintenance.

Where, after decree in a creditor's suit, the Plaintiff sold a debt which he had proved in the cause, and took from the purchaser a deed of indemnity against all expenses which he had incurred and might incur in the suit, and his name continued to be used as Plaintiff in the suit, together with that of the purchaser; it was held, that this transaction amounted to maintenance, and the bill was, upon that ground, dismissed.

HARRINGTON and MILLIGAN v. LONG.

THE bill was filed by *Joseph Harrington* and *Charles Milligan* as a supplemental bill, and it prayed that the Plaintiff *Harrington* might have the benefit of a decree which had been obtained by the Plaintiff *Milligan* as a creditor of the deceased testator *Long*, in a suit instituted by *Milligan* for the benefit of himself and all other the creditors of *Long*. The bill stated, as supplemental matter, that the Defendant *Sarah Long*, the executrix of the testator, had proved the will since the decree had been obtained, and that no account of the testator's assets had been directed against her in the original suit, although she had been made a party Defendant to that suit, as claiming to be entitled to the testator's real estate under a deed executed by the testator five days only previous to his death; and the bill also stated, as supplemental matter, that the deed, so executed by the testator in her favour, was made when the testator was in a state of mental incapacity, and ought to be declared fraudulent and void as against creditors. The bill further stated, that, subsequently to the decree obtained by *Milligan* in the original suit, the Plaintiff *Milligan*, in consideration of a sum of 60*l.*, had assigned the debt, amounting to 95*l.*, which he had proved before the Master, to *Harrington*, with whom he had joined as co-plaintiff in the supplemental suit.

The Defendant *Sarah Long*, by her answer, stated that she had been informed, and believed, that such an assignment

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assignment of the debt of 95*l.* as was stated in the bill had been made by *Milligan* to the Plaintiff *Harrington*, and that she believed such assignment to have been made solely for the purpose of prosecuting this suit; and she submitted that such assignment was contrary to law.

1838.

HARRINGTON
v.
LONG.

Before the Plaintiff's counsel opened the case, the objection raised by the answer of the Defendant *Sarah Long* was taken; namely, that the bill could not be maintained, inasmuch as the assignment made by *Milligan* to the Plaintiff *Harrington*, was made solely for the purpose of enabling the latter to prosecute the suit, and upon the further ground that the assignment of the debt was accompanied by a deed of indemnity from *Harrington* to *Milligan* against the expenses which had been already incurred, or might be incurred, by *Milligan* in the prosecution of the suit.

Mr. Bickersteth, *Mr. Pemberton*, and *Mr. Wakefield*, in support of the objection.

The transaction between *Harrington* and *Milligan* amounts clearly to a case of maintenance. The question is, not merely whether this Court will give effect to the assignment of a right which can only be enforced by litigation, but whether the Court will give effect to the assignment of a suit actually instituted. It is alleged that *Harrington* has an interest in a debt to a large amount, found in another suit to be due from the testator in this cause to a *Mr. Bowater*. Admitting that to be the fact, how stands the transaction? Here is a party, who, before the claim of a litigant — that litigant being an entire stranger to him — is established, and while the matter is still *sub judice*, bargains for that claim, and buys it at a low price for collateral purposes, and with a view to obtain relief from this Court in matters
not

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 v.
 LONG.

not directly connected with the object of the suit. If *Milligan* had not prosecuted the original suit in a proper manner, it was open to *Harrington* to apply to this Court to obtain the conduct of it. That would have been the regular course of proceeding; but this Court will not permit a stranger to buy the claim of a creditor who has instituted a suit, in order to make the claim so purchased the instrument of further litigation. Suppose the case of a person who happened to have an enmity against another, who was indebted to a third party; such a person might find effectual means of indulging his vindictive feelings, if it were lawful for him to purchase a debt of 100*l.* for a trifling consideration, and, by a course of expensive and harassing litigation, to make that purchase the instrument of the ruin of the original debtor. The principles applicable to maintenance and champerty at law are fully recognised in courts of equity: *Wood v. Downes.* (a)

Mr. *Barber*, for a Defendant interested under the will of *Long*, submitted, that a suit could not be maintained by co-plaintiffs, one of whom had an interest, and the other no interest in the subject-matter of the suit; and he cited the following cases in support of that proposition; *The King of Spain v. Machado* (b), *Cuff v. Platell* (c), *Makepeace v. Haythorne.* (d)

The MASTER of the ROLLS.

There is no principle which prevents a person from assigning his interest in a debt after the institution of a suit for its recovery. Maintenance is where there is an agreement by which one party gives to a stranger the

(a) 18 *Vcs.* 120.
 (b) 4 *Russ.* 225.

(c) *Ibid.* 242.
 (d) *Ibid.* 244.

the benefit of a suit, upon condition that he prosecutes it. In *Wood v. Downes*, Lord *Eldon* thought this was done indirectly; in *Hartley v. Russell* (a), it appeared to me that it was not done. Maintenance is properly discouraged, because it promotes litigation and leads to oppression. But the mere assignment of the subject of a suit cannot be considered as maintenance. Such an assignment gives the person to whom it is made a right to institute a new proceeding in order to obtain the benefit of the assignment; and the proper mode of doing this, in the present case, would have been by filing a supplemental bill, in which the assignor should have been made a defendant. But how can the assignor be joined as a plaintiff in such a proceeding?

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HARRINGTON
v.
LONG.

Mr. *Tinney*, for the Plaintiffs.

The Plaintiff *Harrington* had only a *chose in action* by the assignment; and it was necessary to bring before the Court the person in whom the legal right to the debt remained. Whether the assignor is brought before the Court as a plaintiff or as a defendant is not material, either for the purposes of substantial justice, or even with reference to the ordinary practice which prevails in framing bills as to the mode of introducing formal parties. A person having a claim, and a mere stranger to that claim, cannot join; but where the legal right is in one person, and the equitable interest is in another, such persons are properly joined as co-plaintiffs. This Court always takes care to have the person entitled to the legal interest before it, in order that he may be compelled to do every thing which is necessary to give effect to the claim of the person who has the beneficial interest. The Court has decided that the assignment

(a) 2 *Sim. & Stu.* 244.

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assignment of *Milligan's* debt to the Plaintiff was not maintenance; and as to the deed of indemnity against costs, which is now, for the first time, alleged to have been given, that could not alter the character of the transaction, supposing it were open to the Defendants to go into the consideration of that question. So far from such a deed of indemnity being unlawful, it has been decided that, upon the sale of an interest under a contract, the seller becomes a trustee for the second purchaser, and the second purchaser is bound to indemnify the seller against any costs incurred in proceedings for his benefit : *Wood v. Griffith (a)*. But even if the law were otherwise, no question can now be raised as to the effect of the supposed deed of indemnity; for the fact of such a deed having been given is not stated upon the pleadings, and no notice has been given to the Plaintiff for the production of such an instrument at the hearing.

On the other side it was insisted, that the fact of the deed of indemnity having been given was proved by the solicitor of the Defendant *Sarah Long*, who had been examined by her in the supplemental suit; and that the question as to the effect of such an instrument was sufficiently put in issue by the answer of *Sarah Long*.

The MASTER of the ROLLS said, that notice for the production of the deed at the hearing ought regularly to have been given; but that, as the answer of the Defendant alleged that the assignment had been obtained by *Harrington* solely for the purpose of enabling him to prosecute the original suit, and to impeach the deed which gave the property to *Sarah Long*, the deed of indemnity was a fact to prove the truth of that allegation; and

(a) 1 *Swanst.* 43.; and see *Sugden's V. & P.* vol. i. p. 564. 9th edit.

and that it was not necessary, in any case, to state in the answer the particular evidence by which a fact was to be established. The proof of the deed of indemnity was therefore admissible, and, although incomplete by reason of the want of notice to produce the deed, was sufficient to induce the Court to direct an inquiry before the Master as to the existence of the deed.

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LONG.

Upon this opinion being expressed by his Honor, the deed of indemnity was produced by the Plaintiff *Harrington*, who was present in Court; and it appeared to be to the effect stated by the Defendant's counsel. Upon the production of the deed, his Honor declared his opinion that this was clearly a case of maintenance, and he accordingly dismissed the bill.

Upon the question of costs, the Master of the Rolls directed the costs of all parties, except the Defendant *Sarah Long*, to be paid by the Plaintiffs; but considering that *Sarah Long* had been well aware of the existence of the deed of indemnity at the time when she put in her answer, and ought then to have defended herself by plea; that her neglecting to adopt this course had occasioned all the subsequent expense incurred in the suit; and that it would, therefore, be unreasonable to give her the costs, which, if she had used due diligence, would have been avoided, his Honor thought that the bill, as to her, ought to be dismissed without costs.

The Plaintiff *Harrington* presented a petition of rehearing.

1834.
May 23, 24.
27.

Mr. *Tinney* and Mr. *Beames*, for the Plaintiff.

It cannot be disputed that the purchase of an interest which is the subject-matter of a suit is perfectly lawful.

In

1834.

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 v.
 LONG.

In *Rolle's Abridgment* (a), it is said, that if a man purchase land of B., pending a suit in Chancery for the land by A. against B., this is not maintenance, though the purchaser has cognisance of the suit. For that proposition a case in the time of Henry 8. is cited; and the law continues unaltered in this respect at the present day. Maintenance consists in unlawfully assisting another to carry on a suit (b); but where a party has himself any species of interest, however remote, in the subject-matter of a suit, and buys the plaintiff's interest in the suit, such a transaction cannot be impeached on the ground of maintenance. In the present case, the Plaintiff *Harrington* had claims to a very large amount upon the estate, the administration of which was the object of the creditor's suit; and he bought the debt of *Milligan* for a *bonâ fide* consideration, with a view to prosecute those claims.

It was not denied in the Court below that an interest *pendente lite* might be lawfully purchased; but it was supposed that the deed of indemnity, given by the purchaser against all costs that might be incurred, tainted the transaction with maintenance. There is no foundation, in reason or authority, for the supposition that an indemnity against costs so given by a purchaser would alter the nature of the transaction. All the authorities, indeed, which have reference to this subject, lead to a directly contrary conclusion. In *Wood v. Griffith* (c) it was decided that the purchaser under a sub-contract was bound to indemnify the original vendee against costs incurred in proceedings for his (the purchaser's) benefit; and are not all the costs to be incurred

(a) Vol. ii. p. 113.

(c) *Sugden's V. & P.* vol. i.

(b) *Co. Lit.* 368. b. 1 *Hawk. P.* p. 564. 9th edit.
 C. c. 83. s. 3.

curred by the Plaintiff *Harrington* in recovering his debt costs in proceedings for his benefit? It has been laid down in this Court, that a purchaser of an estate *pendente lite*, on filing his supplemental bill, comes into the Court *pro bono et malo*, and shall be liable to all the costs in the proceedings, from the beginning to the end of the suit: *Anon.* (a). Where, then, can be the illegality of an indemnity given by the purchaser of an interest *pendente lite* against costs to which the law of this Court declares that he shall be liable? In *Waring v. Ward* (b), Lord *Eldon* says, "If the purchaser of an equity of redemption enter into no obligation with the party from whom he purchases, either by bond or covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage." *Williams v. Protheroe* (c) is a case at law in which the subject of maintenance was much considered; and it was there decided, upon a writ of error from the Court of King's Bench, that an agreement between the seller and purchaser of an estate, whereby the purchaser, bearing the expense of certain suits commenced by the seller, was to have the benefit of those suits, and the purchaser bearing the expense was to be at liberty to use the name of the seller in any actions he might think fit to commence, did not amount to champerty. So, in *Hartley v. Russell* (d), a transaction, in its circumstances certainly somewhat savouring of champerty, was held, by the same Judge who decided the present case, not to amount to champerty.

(a) 1 *Atk.* 89.(b) 7 *Ves.* 332.(c) 5 *Bing.* 309.; and 3 *Younge & Jerv.* 129.(d) 2 *Sim. & Stu.* 244.

1861.
HARRINGTON
v.
LORD.

champerty. How can the purchase of a debt *pendente lite*, which is admitted to be a lawful act, be vitiated by an indebtedness against costs given to the seller, which is an act in itself equally lawful, and which the Court itself will, in many cases, require to be performed: *Slaines v. Morris* (a), *Annesley v. Simeon*? (b) One of the objects of the supplemental bill is to impeach a deed executed by a person alleged to be of unsound mind, five days before he committed suicide; and the effect of dismissing that bill will be to shut out the consideration of the merits of the case upon a mere technical ground, and to compel the appellant, at a great expense, to file a new supplemental bill, which he has indisputably a right to do, in his own name.

MR. KNIGHT, MR. BARBER, and MR. SPENCE, *contra*.

A chose in action may undoubtedly be assigned in equity, and it may be assigned pending a suit for its recovery; but it is no less certain that such an assignment may be made under circumstances which will render it illegal; and the circumstances which accompanied *Harrington's* purchase of the debt, as well as the admitted object for which the purchase was made, taint the transaction with maintenance. The question, here, is, not whether a man may or may not lawfully purchase the demand of another; but whether he may intervene in a suit for the purpose of increasing the bulk of litigation. It is clearly maintenance to buy a suit for a collateral object, and for the purpose of making that suit the foundation of a mass of litigation, and the instrument by which claims are to be advanced of a totally distinct nature from the subject-matter of the purchase. It was to secure the seller against the costs and

(a) 1 V. & B. 8.

(b) 4 Mad. 390.

and consequences of that fresh mass of litigation; that the deed of indemnity was given, and it was upon that ground that the Master of the Rolls properly laid so much stress upon that instrument. The purchase was not made simply to carry on *Milligan's* suit, but to impeach the validity of a deed on the ground of fraud, and for that purpose a great number of witnesses have been examined, and the pleadings increased to an enormous bulk. The mere assignment of the debt, had it been made *bonâ fide* for an adequate consideration, would have been an innocent transaction; but the deed of indemnity discloses the real nature of the dealing between the parties, and proves that the purchase was made with a view to the litigation, which was, in fact, subsequently engrafted upon the original suit. In *Burke v. Greene (a)*, it was observed by Lord *Manners*, that if the buyer of an interest which is the subject of a suit, has a private end to answer by getting the suit into his hands, that is neither more nor less than dealing for a suit in Chancery which the Court will not allow. That is precisely the present case; a purchase made for such a purpose is, according to all the authorities, maintenance, and the bill was, therefore, rightly dismissed.

1834.
Hansard
v.
Lord.

Mr. *Tinney*, in reply.

The LORD CHANCELLOR made an order affirming the decision of the Master of the Rolls.

Nov. 21.

(a) 2 *Ball & Beut.* 517.

1833.

ROLLS.

1833.

Nov. 13.

DOUCE v. Lady TORRINGTON.

B. by his marriage settlement, made in 1811, covenanted to secure upon certain estates an annuity of 400*l.* for his wife, for her life, in case she should survive him, in addition to the provision made for her by the settlement. He afterwards, by a deed, executed in 1818, and intended to be made in pursuance of the covenant, granted an annuity of 400*l.* to his wife, which was made payable to her after his decease, during her widowhood. By his will, made in

1830, after ratifying and confirming the settlement, he gave an annuity of 400*l.* to his wife during her widowhood, in addition to the provision made for her by the settlement: Held, that the widow was entitled both to the annuity granted to her by the deed, and the annuity given by the will.

The testator began his will by directing that all his just debts, funeral and other incidental expenses, should be paid with all convenient speed after his decease. By a codicil he devised a particular estate, upon trust, in the first place, to pay the annuity to his wife, and, after certain payments, to apply the surplus to the discharge of his simple contract debts: Held, that the real estate was not charged with the payment of debts.

Quære, Whether the introductory words, without more, would have charged the real estate?

By a settlement dated the 30th of *September* 1811, and made on the marriage of Lord *Torrington*, then Captain *Byng*, with the Defendant Lady *Torrington*, the sum of 12,506*l.*, 3 per cent Consolidated Bank Annuities was transferred to trustees, upon trust to pay the dividends to Lord *Torrington* during his life; and after his decease, to Lady *Torrington* for her life; with remainder to the children of the marriage except the eldest son; and by this settlement Lord *Torrington* covenanted, upon his accession to the title and estates of his family, to secure upon the said estates an annuity of 400*l.* a year as a provision for Lady *Torrington*, for her life, in case she should survive him, in addition to the provision made for her by the settlement.

Lord *Torrington* succeeded to the family title and estates in 1813, and by an indenture dated the 2d of *June* 1818, and made between Lord *Torrington* of the first part, his wife Lady *Torrington* of the second part, and the trustees of the settlement of the third part, reciting that Lord *Torrington* had, by his marriage settlement, covenanted to make such further provision for Lady *Torrington*

rington as was therein mentioned, and that the trustees had called upon Lord *Torrington* to fulfil his covenant, it was witnessed that, in full performance of the covenant contained in the said indenture of the 30th day of *November* 1811, Lord *Torrington* granted to Lady *Torrington*, (in case she should happen to survive him,) and her assigns for life, in case she should so long continue his widow, an annuity or rent-charge of 400*l.* to be charged upon and payable out of the manors messuages, hereditaments, &c. therein mentioned, being certain parts of the estate called the *Yotes* estate.

1833,

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v.
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TORRINGTON.

Lord *Torrington* by his will, dated the 4th of *October* 1830, after directing all his just debts, funeral and other incidental expenses to be paid with all convenient speed after his decease, and after ratifying and confirming in every respect the settlement made on his marriage, gave all his messuages, lands, tenements, hereditaments, and real estate whatsoever to the Plaintiffs, whom he also appointed his executors, and their heirs, upon trust in the first place, out of the rents and profits of the said manors, messuages, lands, and hereditaments, to raise and pay to Lady *Torrington* an annuity of 400*l.* during her life, if she should so long continue his widow and unmarried, but not otherwise, in addition to the provision made for her by her marriage settlement; and upon the further trusts therein mentioned.

The testator made a codicil to his will, dated the 15th of *April* 1831, in the following words:—“Whereas I have in and by my said will directed that the rents and profits of my *Yotes* estate shall, after the payment of an annuity to my wife the Viscountess *Torrington*, be paid to my son *George Byng* for his use during his life, now I hereby direct that the trustees in my will named shall receive the yearly rents and profits arising from my said

1859.
Barrett v. Lady Torrington.

Y^{ours} estate, and after paying thereout the annuity to my said wife, pay and allow unto the said *George Byng* the sum of 200*l.* per annum until he shall attain the age of twenty-one years; and after he shall have attained such age, pay and allow to him out of the same rents and profits the yearly sum of 300*l.*, and apply the yearly surplus of the said rents and profits of my said estate in discharge of the simple contract debts owing by me, it being my desire that the whole amount of such yearly rents shall not be paid to the said *George Byng*, or to the person or persons who under my said will may be entitled to the same, until the said debts and interest thereon are fully paid."

The bill was filed by the trustees and executors of the will of Lord *Torrington* against the Dowager Lady *Torrington*, the trustees of the settlement, the present Lord *Torrington*, and all other parties interested under the will; and the questions in the cause were, first, whether Lady *Torrington* by the marriage settlement, the deed of *June* 1818, and the will, was entitled to two annuities of 400*l.* a year, or to one only; and secondly, whether the real estate of the testator was subjected to the payment of his debts.

Mr. *Spence*, for the trustees and executors.

Mr. *Bickersteth* and Mr. *Wray*, for Lady *Torrington*.

Mr. *Pemberton*, for Lord *Torrington*.

Mr. *G. Richards*, for one of the legatees under the will.

As to the first point it was argued, on the part of Lady *Torrington*, that she was entitled as well to the annuity of 400*l.* secured to her by the deed of *June* 1818, purporting

porting to be made, as it was no doubt intended to be made, in pursuance of the covenant in the marriage settlement, as to the annuity of 400*l.* given to her by the will of Lord *Torrington*. It was true that in general the leaning of the Court was against double portions or provisions, where any doubt could be raised as to the intention of the party by whom they were given; but in this case the Court was precluded from acting upon its general inclination. The language of the testator was express, and unequivocal; he had directed, in terms which were entirely free from all ambiguity, that the annuity of 400*l.* given by his will should be in addition to the provision made for Lady *Torrington* by her marriage settlement, which settlement he by his will ratified and confirmed in every particular. It was impossible, therefore, for the Court, whatever might be its inclination or its conjecture upon the subject, to make a declaration in contradiction to the expressed will of the testator.

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On the other hand, it was contended for Lord *Torrington* the son, that there could be no doubt that the real intention of the testator was to give by his will an annuity of 400*l.* in satisfaction of the covenant in his marriage settlement; that the effect of deciding that Lady *Torrington* was entitled to two annuities of 400*l.* would be almost wholly to deprive of income the heir to the title; and that there was sufficient indication of the testator's intention to put Lady *Torrington* to her election. In executing the deed of 1818 Lord *Torrington* did that which was considered both by himself and by the trustees as a satisfaction of the covenant in the settlement. The date of the settlement was erroneously recited in that deed, and the annuity; instead of being given to Lady *Torrington* absolutely for her life in pursuance of the terms of the covenant, was by the deed granted to her only during her widowhood — circum-

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stances shewing that the settlement was mislaid. There could be no doubt that, when Lord *Torrington* made his will, he had forgotten the deed which he had executed twelve years before, and that he intended only to confirm by his will the additional provision for which he had covenanted in the settlement, and which he had actually made by the deed. The circumstance of his having in express terms ratified and confirmed the settlement by his will, furnished one of the strongest arguments to shew that he had forgotten the deed of 1818; for it was extremely improbable that he would have used the expressions by which he confirmed the settlement, if he had been aware that he had already executed a deed in confirmation of it; while nothing could be more natural than the use of those expressions, coupled with the gift of an annuity of the same amount which he had covenanted to give by the settlement, if the deed of 1818 had wholly escaped his recollection. By the codicil the testator directed his trustees to apply the rents of the *Yotes* estate in discharge of the annuity to his wife; an expression clearly indicating that the testator had but one annuity in his contemplation, and inconsistent with the supposition that he intended to give two annuities of 400*l.*, instead of the single annuity to that amount which he had covenanted to give by the settlement.

Upon the second point, it was contended, on the one side, that the introductory words of the will, by which the testator directed all his just debts, funeral and other incidental expenses to be paid with all convenient speed after his decease, would clearly, if there were nothing in the will to control the effect of those words, charge the real estate with the payment of debts. *Clifford v. Lewis.* (a) But it might be said that the subsequent charge of a particular

(a) 6 *Mad.* 53.

ticular estate with the payment of his simple contract debts shewed that it was not the intention of the testator to charge his real estates generally with the payment of debts. There was, however, no ground for such an inference; the charge upon the particular estate might be made with a view to give an additional remedy to the simple contract creditors, and was perfectly consistent with the general charge upon the whole of his real estates. In *Thomas v. Britnell* (a) the testator, after using introductory words similar to those used by the testator in the present case, devised particular estates, out of which he excepted two by name, upon trust, in the first place, to pay his debts and all legacies given by his will. There the subsequent part of the will was inconsistent with the implication derived from the general introductory words; here there was no inconsistency between such implication and the particular direction in the codicil.

1838.

 Douch
 v.
 Lady
 TORRINGTON.

On the other side, it was conceded that the present case could not be distinguished from *Clifford v. Lewis*.

The MASTER of the ROLLS.

The settlement amounts to an equitable grant of 400*l.* a year upon the estates in question, and the deed of 1818 gives to Lady *Torrington* a legal security for her equitable annuity, but is no addition to the settlement. The will provides for Lady *Torrington* an annuity of 400*l.* a year expressed to be in addition to her settlement. Whatever, therefore, may be conjectured as to the real intention of the testator, no court can deprive her of the two annuities, to which she is clearly entitled by the plain terms of the instruments. It is a great satisfaction to the Court in this case that the question here is between mother and son, and altogether amicable; and there can be little doubt, therefore, that what may be considered to

have

(a) 2 *Ves. sen.* 315.

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have been the real intention of the testator with respect to the two annuities will between them be carried into effect.

As to the second question, the language used by the testator imports no intention on his part that his just debts, funeral and incidental expenses, should form a charge upon his real estate. He desires that these payments may be made with all convenient speed after his decease; but this direction is fully satisfied by an intention that the payment should be made out of the personal estate alone. There is here no expression, as in the case of *Clifford v. Lewis*, that his debts were in the first place to be paid, which was held to import that his debts were to be discharged before the subsequent gifts in his will should take effect, and therefore to over-ride all property given by the will. It is plain, however, from the codicil that the testator did not intend a general charge of debts upon his real estate; for by that codicil he directs the *Yotes* estate to be applied in the first instance to the payment of the annuity to Lady *Torrington*, and the surplus only to be applied to the payment of his simple contract debts. The strong inclination of my opinion is, that the introductory words in this case do not indicate the intention of the testator to create a new fund for the payment of his debts; but it is unnecessary to decide the question upon that ground, because the codicil makes it clear that the testator did not intend a general charge upon his real estates.

It may be observed that the annuity granted in 1818 is contrary to the effect of the covenant in the marriage settlement, being an annuity given, not absolutely for the life of Lady *Torrington*, but during her widowhood only. Lady *Torrington*, in a suit framed for that purpose, would be relieved against this improper restriction; but there can be no doubt that this will be arranged without the necessity of a suit on her part.

WITHERS v. KENNEDY.

1881

Nov. 15.

RICHARD TYSER made his will in the following words: "I give and bequeath unto my dear wife, *Mary Ann Tyser*, all my furniture, plate, linen, china, books, and other effects whatsoever, in my dwelling-house at *Westham* or elsewhere, at the time of my decease, to and for her own use and benefit; and I give, devise, and bequeath all my freehold, copyhold, and leasehold estates, whatsoever and wheresoever, and all the residue of my personal estate and effects, after payment of my just debts, and my funeral expences, and the charges of proving this my will, and of carrying the trusts thereof into execution, unto and for the use of my said wife, *Mary Ann Tyser*, *Isaac Blydestein*, wine merchant, *Anna Blydestein*, spinster, and *Arend Jacob Guitard*, notary public, their heirs, executors, and administrators, according to the nature and tenure thereof, upon the trusts hereinafter mentioned; that is to say, upon trust, during the life of my said wife, to permit and suffer her to hold and enjoy the said freehold, copyhold, and leasehold estates, without impeachment of waste, and to receive and take for her own use and benefit the rents and profits thereof, and the interest, dividends, or annual produce of my personal estate, and of the stocks, funds, or securities in or upon which the same may be invested or placed out, the same to be for her own separate use, independently of any future husband whom she may marry, and free from his controul or interference; and the receipt or receipts of my said wife to be at all times a sufficient discharge for the rents, profits, interest, and dividends;" with divers limitations over.

A testator, after a specific bequest of part of his personal estate, devises all his freehold, copyhold, and leasehold estates, and all the residue of his personal estate and effects, after payment of his just debts and funeral expenses, to trustees, their heirs, executors, and administrators, upon certain trusts. The real estate is charged with the payment of debts.

The

1893.

WITHERS
v.
KENNEDY.

The bill was filed by a creditor for the administration of the testator's estate against the executors and all parties interested under the will, and the question in the cause was whether the real estate of the testator was charged by the will with the payment of debts.

Mr. *Bickersteth* and Mr. *Whitmarsh*, for the Plaintiff.

The testator has used an expression, "after payment of my just debts," which, taken in connection with the devise of his freehold, leasehold, and copyhold estates, and the residue of his personal estate, which immediately precedes that expression, plainly indicates that he intended to charge his real estate with the payment of his debts. To confine the words "after the payment of my just debts" to the residue of the testator's personal estate, would be a forced and artificial construction of the sentence. The testator evidently intended to make every species of his property liable to the payment of his debts; and it is only by resorting to an artifice of punctuation, which is, under any circumstances, an erroneous principle of interpretation, that any doubt can be thrown upon the import of the language which he has used. In *Shallcross v. Finden* (a), Lord *Alvanley* said, the words "after payment of my debts" mean that until the testator's debts are paid he gives nothing; that every thing he has shall be subject to his debts. To give those words any effect, they must charge the real estate.

Mr. *Pemberton* and Mr. *Flather*, *contra*.

The personal estate is the natural fund for the payment of debts, and the gift of the residue of the testator's personal estate immediately precedes the words "after
payment

(a) 3 Ves. 738.

payment of my just debts, and funeral expences." It is surely a more obvious and natural construction of the sentence to refer the words "after payment," &c., to the immediate rather than to the more remote antecedent; that more remote antecedent being, moreover, a species of property not legally liable to the payment of debts. *Shallcross v. Finden* does not apply to the present case; for there the testator commenced his will with a direction for the payment of all his debts, and such introductory words would, undoubtedly, be sufficient to charge the real estate.

1833.
WITHERS
v.
KENNEDY.

The MASTER of the ROLLS.

The expression upon which the question depends affords some colour for the argument used; but, in plain construction, it is to be referred to the freehold, copyhold, and leasehold property, as well as to the personal estate; and those who insist upon limiting the generality of the expression must find that limit in the language used. It may be remarked that the leasehold estate is comprised, with the freehold and copyhold, in the antecedent part, and that leasehold estate is by law subject to the debts and other charges; and to say that the expression "after payment of my debts" is not to be referred to the freehold, leasehold, and copyhold property, is to say that, according to the testator's intention, the leasehold property is not to be applied to the payment of debts. My opinion is, that the real estate is by this will charged with the payment of debts.

1833.

Rolls.
Nov. 16.

1834.

L. C.
May 28, 29.
Nov. 21.

JONES v. WATERS.

The Plaintiff acting as solicitor of a banking firm, in order to prevent the taking out of circulation notes issued in the lifetime of the testator, who was at the head of the banking concern, induced the mother and guardian of the testator's heir to forego proceedings to compel the application of the primary funds to the payment of the testator's debts in exoneration of certain descended estate, by representing that such proceedings were wholly unnecessary, and that the property prima-

arily liable was abundantly sufficient for the payment of the testator's debts. The Plaintiff afterwards filed a creditor's bill against *J. W.* the executor and devisee of the testator, and against the heir, and upon the bankruptcy of *J. W.*, his assignees were brought before the Court by a supplemental bill: Held, that the Plaintiff was entitled to the common decree against the personal and devised real estate of the testator, but the bill, as against the heir, was dismissed with costs.

THE bill alleged that in the year 1821 the Plaintiff, *William Jones*, deposited in the banking house of *Robert Waters of Carmarthen* the sum of 1500*l.*, and that the same remained due to him, with interest, at the death of *Robert Waters*, which happened in the year 1827. *Robert Waters*, by his will made in 1813, devised and bequeathed all his real and personal estate, subject to certain legacies, to his brother *John Waters*, his heirs and executors, and constituted his said brother his sole executor. *Robert Waters*, some time prior to, and up to the time of his death, used the names of his brother *John Waters*, and of one *David Jones*, as his partners in the banking house; but the bill alleged that *John Waters* and *David Jones* were mere nominal partners, and had no beneficial interest in the concern. After the making of his will, *Robert Waters* purchased several freehold estates, which descended to *Thomas Waters* as his heir at law. Immediately upon the death of *Robert Waters*, his brother *John Waters* took possession of all his personal estate, and all his real estate, including the descended as well as the devised estates, and formed a new banking firm with *David Jones* and one *Arthur Jones*.

Thomas Waters, the heir at law, was, at the death of the testator, an infant. The infant's mother and guardian,

dian, being desirous to ascertain and secure the interest of her son in the descended estate, consulted upon that occasion her solicitor, *Thomas Jones*, who, although of the same name, was in no manner related to or connected with the Plaintiff *William Jones*. The mother was advised by her solicitor that so long as the banking notes which had been issued by *Robert Waters* in his lifetime remained in circulation, the interest of her son in the descended estate might be affected by them, and that for his protection it was necessary that those notes should be called in, and, together with all other debts, paid out of the other property of the testator, if any, which was primarily applicable to their satisfaction, and which was admitted to be amply sufficient for that purpose.

1838.
JONES
v.
WATERS.

Upon this information *Thomas Jones*, by the mother's direction, applied on her behalf to the Plaintiff *William Jones*, who then acted as the confidential solicitor of the new firm; and proceedings were threatened on the part of the mother, in order to secure the interest of her son in the descended estate by compelling the payment *aliunde* of all the testator's debts. It being for the interest of *John Waters* and the other partners in the new firm that the notes issued by the testator *Robert Waters* in his lifetime should remain in circulation, the Plaintiff *William Jones*, acting as their agent, represented to the mother and her solicitor, *Thomas Jones*, that it was wholly unnecessary that any proceedings should be taken for the purpose of securing the interest of her son in the descended estate; that the property primarily liable to the debts of *Robert Waters* was abundantly sufficient for the payment of them; that there was no danger, therefore, that the descended estate would ever be charged with any debts; and that *John Waters* would deliver up the possession of the descended

1833.

JONES
v.
WATERS.

descended estate to her as guardian of her son, and would deliver the title deeds of the descended estate to him, the Plaintiff, and a friend to be named by the mother, upon their engagement to deliver such title deeds to the son upon his attaining the age of twenty-one. It was further proposed to the mother that *John Waters*, and the other partners in the new firm should execute a bond to indemnify her son and the descended estate against the payment of all debts due by *Robert Waters* at the time of his death. The mother was induced by these representations and engagements to forego the institution of any proceedings for the protection of the descended estate; and *John Waters* and his partners, in pursuance of the proposed arrangement, executed a bond of indemnity, which was prepared and attested by the Plaintiff *William Jones*, and contained recitals to the effect of the representations made by the Plaintiff. The possession of the descended estate was delivered to the mother as guardian of her son, and the title deeds of that estate were delivered over to the Plaintiff *William Jones* and another trustee, upon their engagement to hand them over to the son when he should attain twenty-one.

Notwithstanding these facts, which were proved by the evidence in the cause, the Plaintiff filed his bill, on behalf of himself and other creditors, to recover the debt which he alleged to remain due to him from the estate of the testator *Robert Waters* out of his general property, including the descended estate; and the parties Defendants to the bill were *Thomas Waters*, the heir, *John Waters*, and his partners, *David Jones* and *Arthur Jones*. A commission of bankrupt having issued, after the filing of the original bill, against *John Waters* and *David Jones*, the assignees under the commission were brought before the Court by a supplemental bill. The De-

fendant

Defendant *John Waters*, in his answer to the original bill, which was filed before his bankruptcy, admitted the debt claimed by the Plaintiff. The Defendant *Thomas Waters*, and the assignees under the commission of bankrupt did not admit the debt, and the Defendant *Thomas Waters*, by his answer, insisted that the Plaintiff had in equity no claim against him or the descended estate by reason of the collusion between the Plaintiff and the Defendants *John Waters*, *David Jones*, and *Arthur Jones*, in regard thereto.

1833.

JONES
v.
WATERS.

Upon the evidence of Mrs. *Waters*, the mother of the Defendant *Thomas Waters*, and of her solicitor, *Thomas Jones*, being tendered to prove the above stated facts, it was objected on the part of the Plaintiff that such evidence was not admissible, inasmuch as those facts were not stated in the Defendants' answer.

The MASTER of the ROLLS held that such evidence was admissible, being in support of the defence made by the answer; namely, that the Plaintiff was not entitled to relief by reason of the collusion between him and the Defendants, the partners in the firm, in regard to the descended estate.

Mr. *Twiss* and Mr. *Rolfe*, for the Plaintiff.

Mr. *Bickersteth* and Mr. *Pemberton*, for *Thomas Waters*, the heir, admitted that if the Plaintiff could establish his claim, with respect to which there must be an inquiry, he was entitled to relief against the personal and devised estate of the testator; but they insisted that the Plaintiff had no equity as against the descended estate. The evidence fully established that, but for the conduct of the Plaintiff, the interest of the infant heir in the descended estate might have been secured against all demands of

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creditors,

1888.

Jones
v.
Watkins.

creditors, and the Plaintiff would not be permitted in a court of equity to take advantage of his own wrong, and to charge the estate which by his own misrepresentations he had induced the guardian of the infant to leave unprotected. A party who made misrepresentations could not come into a court of equity with clean hands, and it was a principle well established by the authorities that the mouth of such a party was closed as against those who had been misled by his misrepresentations. *Montefiori v. Montefiori* (a), *Neville v. Wilkin-son* (b), *Scott v. Scott* (c), *Dalbiac v. Dalbiac*. (d)

Mr. *Tinney*, for the assignees.

Mr. *Twiss*, in reply, contended that no inquiry as to the Plaintiff's claim ought to be directed, inasmuch as the debt had been admitted by *John Waters*, the executor of the testator, before his bankruptcy.

1888.
1889.

The MASTER of the ROLLS.

If there be a debt due to the Plaintiff from the estate of the testator, he will be plainly entitled to relief against the estate of the testator as far as regards the personal and the devised real estate. It is argued for the Plaintiff that the admission of that debt by the Defendant *John Waters* before his bankruptcy will bind his assignees, and render all inquiry into the existence of the debt unnecessary. That argument would prevail if the admission made by *John Waters* were clearly *bonâ fide*, which, under the circumstances of this case, I cannot consider it to have been. The assignees under the commission are therefore entitled to a reference to the Master to inquire whether any and what debt was due from the testator

Robert

(a) 1 *Blackst.* 563.

(b) 1 *Bro. C. C.* 548.

(c) 1 *Cox*, 366.

(d) 16 *Ves.* 116.

CASES IN CHANCERY.

415

Robert Waters at the time of his death, and now remains due from his estate, with liberty to the Master to state special circumstances.

1838.

JONES
v.
WATERS.

With respect to the Defendant *Thomas Waters*, the heir of the testator, I am of opinion that the bill as against him must be dismissed with costs. The Plaintiff, by his representations and conduct, in collusion with the Defendants *John Waters* and his partners in the new firm, induced the mother to forego those proceedings which would have effectually secured the descended estate from all debts of the testator *Robert Waters*; and it is contrary to reason and equity that he should now be permitted to avail himself, against the descended estate, of that forbearance on the part of the mother of which he was himself the cause.

The Plaintiff presented a petition of re-hearing.

1854.
May 28, 29.

The Solicitor-General, Mr. *Rolfe*, and Mr. *Piggott*, for the Plaintiff.

Sir *Edward Sugden*, Mr. *Knight*, and Mr. *Harwood*, *contra*.

Mr. *Tinney*, for the assignees.

The LORD CHANCELLOR made an order affirming the decision of the Master of the Rolls.

Nov. 21.

1635r

1835.
ROLLS.
March 14.

MELLOR v. CRESSWELL.

Where an answer was reported insufficient, and the Plaintiff obtained the common injunction, and also an order for liberty to amend, and that the Defendant should answer the exceptions and amendments at the same time, a motion for the extension of the injunction to stay trial was refused.

THE bill was filed for a discovery in aid of a defence to an action of ejectment which had been brought by the Defendant. Exceptions were taken to the answer of the Defendant; and the answer having been reported insufficient, the Plaintiff obtained the common injunction on the 11th of *March*. On the same day the Plaintiff obtained an order for liberty to amend his bill within three weeks, without prejudice to the injunction; and that the Defendant should answer the amendments and the exceptions at the same time. The commission-day for the assizes, at which the action was to be tried, was the 17th of *March*, and notice of trial had been given by the Plaintiff at law. On the 14th of *March* a motion was made, on the part of the Plaintiff in equity, to extend the injunction to stay trial. The affidavit in support of the motion stated that exceptions had been taken to the answer of the Defendant, and allowed by the Master; but it did not state the order obtained by the Plaintiff for leave to amend, and for the answering of the amendments and exceptions together; and it contained the usual statement, that the deponent could not safely go to trial until the further answer of the Defendant was put in.

The motion was opposed partly on the ground that the case made by the bill, if admitted, would not support the injunction; but principally on the ground that the course taken by the Plaintiff in obtaining, four days before the assizes, an order to amend, and for the answering of the amendments and exceptions at the same

same time, was irregular, and adopted for the purpose of rendering it impossible for the Defendant to go to trial. The case of *Brown v. Reina* (a), was cited.

1835.
MELLOR
v.
CRESSWELL.

Mr. *Bickersteth* and Mr. *Walker*, in support of the motion.

Mr. *Webster*, *contra*.

*The MASTER of the ROLLS.**

The injunction to stay trial grows out of the common injunction; and as the Plaintiff, by amending his bill, admits that, as it stood originally, he had not a case for the injunction, I do not think that, by amending after answer, he can place himself in a better situation. The case of *Brown v. Reina* seems expressly in point.

Motion refused with costs.

(a) 3 *Younge & Jerv.* 389.

* Sir *C. Pepys*.

1835.

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March 21.

FRANK v. BASNETT.

An action brought after a decree, upon the subject-matter referred to the Master, and pending the proceedings in his office, will be restrained, upon motion, by special injunction; and if a supplemental bill be filed, praying such injunction, it is not necessary to obtain in the first instance the common injunction.

THE bill was filed for the specific performance of an agreement, by which the Defendant agreed to convey to the Plaintiff certain pieces of land adjoining a mill-stream, and the Plaintiff agreed to erect a bridge across the stream. The Plaintiff obtained a decree for the specific performance of the agreement, and a reference was directed to the Master to settle a conveyance. After the decree and pending the proceedings in the Master's office, the Defendant brought an action against the Plaintiff for damages alleged to have been occasioned by the Plaintiff not having erected the bridge. The Plaintiff filed a supplemental bill, praying an injunction to restrain the Defendant from further proceeding in the action. A motion, supported by affidavits, was afterwards made, on the part of the Plaintiff, for a special injunction to restrain the Defendant from proceeding in the action, and such special injunction was granted by the Master of the Rolls. A motion was now made to discharge the order for that injunction.

Mr. *Wigram* and Mr. *Stinton*, in support of the motion, contended that the special injunction had been irregularly obtained, inasmuch as the Plaintiff might have obtained the common injunction for want of answer to the supplemental bill, and the Court never granted a special injunction to stay proceedings at law, except in cases when the Plaintiff had had no opportunity of obtaining the common injunction: *James v. Downes* (a),
Franklyn

² (a) 18 Feb. 522.

CASES IN CHANCERY.

619

Franklyn v. Thomas (a), *Hine v. Fiddes* (b), *Jones v. Bassett* (c), *Bevan v. Reid*. (d)

1835

FRANK

v.

BASNETT.

Mr. *Wakefield*, *contra*, contended that the general rule as to obtaining the common injunction to restrain proceedings at law did not apply to cases where an action was brought after decree. *Reynolds v. Nelson* (e), was an authority in point; there, after a decree for specific performance, the Defendant, who had brought an action for damages against the Plaintiff in equity, in respect of the non-completion of the contract within the specified time, was restrained by special injunction from proceeding. The proceeding at law, after a decree upon the same subject-matter, was in fact as much a contempt as such a step would be before the decree of this Court. *Bell v. O'Reilly* (g) was an authority to the same effect as *Reynolds v. Nelson*; in that case, Lord *Redesdale* observed that, if actions were permitted to be brought upon the subject-matter referred to the Master, there would be an end to the jurisdiction of the Court.

Mr. *Wigram*, in reply, argued that a party was not barred, by a decree for specific performance, from resorting to his remedy at law for damages, if the performance of the contract were delayed; nor did it necessarily follow that, because the proceedings had commenced in equity, no recourse could afterwards be had to a court of law. As to the point of practice, the Plaintiff had thought proper to file a supplemental bill instead of proceeding by attachment, which would have been the obvious course if the action could really have

(a) 3 *Mer.* 225.

(b) 2 *Sim. & Stu.* 370.

(c) 2 *Russ.* 405.

(d) *Ibid.*; and see *Drummond v. Pigou*, p. 168. *suprà*.

(e) 6 *Mad.* 290.

(g) 2 *Scho. & Lef.* 430.

1835.


FRANK
v.
BASNETT.

have been treated as a contempt, and, having filed a bill, he was bound to obtain the common injunction in the usual manner, and could not regularly obtain a special injunction in the first instance.

*The LORD CHANCELLOR.**

No action could be brought upon the contract up to the time of the decree, and after the decree some time must necessarily elapse before the directions of the Court could be carried into effect. Supposing that there was improper delay in the Master's office, the whole proceedings were before the Court, and it was competent to the party complaining of such delay to apply to the Court, and, if he were so advised, to move for liberty to bring an action. Had such a course been adopted, the Court might, if it had seen occasion, have directed an action to be brought; but the Defendant had no right to resort himself to a court of law pending the proceedings in the Master's office.

I consider the form in which the proceedings at law are sought to be restrained, whether by supplemental bill or otherwise, wholly immaterial; and that the Plaintiff is entitled to have the action restrained by special injunction, upon the ground that it is an infringement of the rules of the Court to bring an action, while the Court is working out a decree, and that where a proceeding is before this Court, and the Court has full power to do justice, a party ought not to resort to any other tribunal.

* Lord Lyndhurst.

1835.

RICHARDS v. WOOD.

March 21.

MR. KINDERSLEY moved, on the part of the Defendant, that the enrolment of a decree in this cause, which had been obtained by the Plaintiff, might be vacated for irregularity, or, if the Court should be of opinion that there was no irregularity, that it might be vacated as having been improperly obtained. The decree was made by the Vice-Chancellor on the 19th of *March* 1834. On the 31st of *May* the Defendant lodged a *caveat*, the effect of which was to stay the enrolment of the decree for twenty-eight days after notice of the docket having been presented for signature. That notice was given by the Plaintiff on the 4th of *August*: a correspondence took place between the solicitors of the parties, in that month, respecting the suit; and on the 30th of *August* the Defendant's solicitor received a letter from the Plaintiff's solicitor, stating that the Plaintiff would not consent to enlarge the time for lodging the appeal.

The answer of the Lord Chancellor to a petition of appeal relates to the day at which the petition was presented.

Where, therefore, a petition of appeal was presented within twenty-eight days after notice had been given of a docket of the decree having been presented for signature, and, the Lord Chancellor being in *Scotland*, the petition was not answered until after the expiration of the twenty-eight days, the enrolment of the decree was vacated.

On the same 30th of *August* a petition of appeal was presented, and left with the Lord Chancellor's secretary, the Lord Chancellor being then in *Scotland*; and the Defendant, at the same time, applied for leave to pay the deposit; but this could not be done before the petition was answered. Notice of the petition having been presented was on the same day given to the Plaintiff's solicitor. The petition was not returned from *Scotland*, with the Lord Chancellor's answer, until the 15th of *September*, at which time the twenty-eight days had expired. The Defendant paid the deposit money on the same day on which the petition was returned.

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 RICHARDS
 v.
 WOOD.

returned. Under these circumstances, there having been no default on the part of the Defendant, he submitted that the enrolment obtained by the Plaintiff ought to be vacated. *Robinson v. Newdick (a)*, was an authority in support of the present application: in that case the petition of appeal was, owing to some accident, not answered until the day after it was presented; and Lord Eldon said, that that was not to prejudice; for, strictly speaking, the party had a right to have the petition answered as soon as it was presented.

Mr. G. Richards and Mr. Bethell, *contra*, contended, that the question being, in reality, which of two innocent parties ought to suffer from the accident of the Lord Chancellor being out of the kingdom, the Plaintiff, to whom no irregularity could be imputed, ought not to be that party. The Defendant's petition was not answered in time to prevent the enrolment of the decree; and although that circumstance had arisen from an accident which the Defendant could not control, the Plaintiff ought not, on that account, to be deprived of his right to have the decree enrolled at the expiration of the twenty-eight days, and to be visited with the heavy expense which would fall upon him if the enrolment were vacated.

*The LORD CHANCELLOR.**

The Plaintiff can only be entitled to have the decree enrolled in consequence of the *laches* of the other side. Here there has been no *laches*; on the contrary, the Defendant did every thing which he was bound to do; and the only question, therefore, is, whether he is to suffer


(a) 3 Mer. 15.

* Lord Lyndhurst.

suffer from the accident of the Lord Chancellor not being in *England* at the time when the petition of appeal was presented. It is not reasonable that he should so suffer; and the case before Lord *Eldon*, cited at the bar, decides that he ought not to be prejudiced by such an accident. I am of opinion, therefore, that the answer of the Lord Chancellor to the petition must relate to the day when the petition was presented. (a)

Motion granted without costs.

(a) See *Barnes v. Wilson*, 1 *Russ. & Mylne*, 486.

1835.

 RICHARDS
 v.
 WOOD

1835,

March 25.

In the Matter of the DE CLIFFORD Estates.

Reference directed under the 1 W. 4. c. 60. in a case where the *cestuis que trust* making the application claimed in respect of interests devised in remainder after the determination of prior estates tail which had failed.

BY the will of *Edward Lord De Clifford*, executed in September 1777, certain estates were vested in the Duke of *Beaufort* and *George V. Vernon*, their executors, &c., for a long term of years, upon the trusts therein mentioned, and subject thereto, the same estates were devised to *William Bromley Chester* and *Samuel Blackwell*, and their heirs, in trust for the testator's eldest son for life; remainder in trust for the first and every other son of such eldest son successively in tail male; remainder in trust for the testator's second son for life; remainder to the first and every other son of such second son successively in tail male; remainder in trust for the testator's third son for life, with the like limitations to his first and every other son in tail male: and in default of such issue, in trust for the fourth, fifth, and every other son of the testator in tail male; remainder in trust for the daughters of the testator's eldest son, as tenants in common in tail; remainder in trust for the daughters of the testator's second, third, and every younger son successively, as tenants in common in tail; remainder in trust for the testator's daughters, as tenants in common in tail, with cross-remainders, &c.

The testator died soon after the execution of his will, leaving three sons, of whom the eldest, the late Lord *De Clifford*, died without issue in 1832, having survived both his brothers, who had also died without issue; and the trust estates became thereupon vested, under the limitations in the testator's will, in the petitioners, *Sophia Baroness De Clifford* (the only surviving child of the testator's daughter, *Catherine*, deceased), as to one third;
in

in the Honourable *Sophia Cust*, and *Mary Elizabeth*, Countess of *Romney*, (the only children of the testator's daughter *Sophia*, deceased,) as to another third; and in *Wm. Charles* Earl of *Albemarle* (the husband of the testator's daughter *Elizabeth*, deceased), as to the remaining third. The Earl of *Albemarle* claimed the equitable fee simple in his one third share by virtue of a common recovery suffered by his late wife, and an appointment made to him thereupon. Of the shares of the several female petitioners common recoveries had also been suffered, and the interests thereby acquired had been made the subject of marriage settlements. Both the trustees were now dead; and *George G. Blackwell*, the heir-at-law of *Samuel Blackwell*, who survived his co-trustee, being abroad, the present petition was presented, under the 1 *W. 4. c. 60.*, on behalf of all parties beneficially interested in the devised estates, praying that the Court might appoint some person, in place of the said *George G. Blackwell*, to convey the legal estate in the devised property to the parties severally entitled thereto, according to their respective interests. It was not sought to disturb the trusts of the term.

1833.
In the Matter
of the
Deceased
Estate.

Mr. *Wigram* and Mr. *Heberden*, in support of the petition, referred to *ex parte Merry* (a), and *ex parte Dover*. (b) The language used by the Master of the Rolls in *ex parte Merry* seemed not consistent with the act of parliament; for if the twelfth section of the act were looked at, which empowered the Court, in difficult and complicated cases, to direct the parties to file a bill, it was plain that a discretion was intended to be given to the Court in that respect; and Lord *Brougham*, when he affirmed the decision and refused to make the order,

went

(a) 1 *Myline & Keen*, 677.

(b) 5 *Sim.* 500.

1835.
 In the Matter
 of the
 Dr CLIFFORD
 Estates.

went simply on the ground that the case was one of too much complication to justify him in proceeding upon petition, without, however, meaning to sanction the doctrine laid down in the judgment of his Honor. In the present instance the circumstances were clear; there was no trust for the payment of the debts; it was not sought to disturb the term of 2000 years; and as all the limitations in favour of the testator's sons were now out of the question, the beneficial interest in the devised property became vested, under the subsequent limitation, in his daughters, whose representatives were the parties now applying for a conveyance of the legal estate. A small portion of the lands in question had been acquired under the award of commissioners in an inclosure act, in exchange for lands comprised in the original devise; but as the inclosure act declared, that land so taken in exchange should be subject to all the same trusts, provisos, and limitations as the lands in lieu of which they were given, no difficulty could arise out of that circumstance.

*The LORD CHANCELLOR** said, that the Master of the Rolls, in his judgment in *ex parte Merry*, appeared to have confined his attention to the eighth section of the act, and to have overlooked the twelfth; the effect of which was plainly to shew that a discretionary power to make the order on petition was meant to be given to the Court. The present was a case in which he thought the discretion might be safely exercised; and he should, therefore, direct the usual reference to the Master.

* Lord Lyndhurst.

1835.

In the Matter of ALLEN's Charities.

ROLLS.
April 16. 35.

IN this case certain copyhold estates were, under the direction of the Master, put up to sale, in twenty-one lots, on the 17th of *January* 1834. Nineteen of the lots were bought by a number of different purchasers, at prices varying from 40*l.* to 540*l.*; and produced, in the whole, the sum of 2800*l.* One of the conditions of sale, as settled by the Master, was, that the purchasers of the several lots should, pursuant to the orders of this Court, made under the 3 & 4 *W. 4. c. 94.*, called the Chancery Regulation Act, respectively pay a fee of 5*l.* on each lot when the purchase-money should not exceed 2000*l.* (a) The solicitor for the purchasers paid over to the Accountant-General, in obedience to the condition above stated, a sum of 95*l.*, being at the rate of 5*l.* upon each lot sold; and that sum was carried to the fee fund, as directed by the thirty-seventh section of the act.

Upon a sale by the Master in lots, the proper fee to be paid, according to the schedule annexed to the orders in Chancery, issued under the 3 & 4 *W. 4. c. 94.* is 5*l.*, where the whole produce of the sale does not exceed 2000*l.*; and 5*s.* on every 100*l.* beyond that sum, without regard to the number of lots or purchasers.

A petition was now presented by the solicitor, praying that the Accountant-General might repay to him the sum of 88*l.* out of the fee fund, on the ground that so much of the 95*l.* originally paid was an over-payment, made upon an erroneous construction of the order; and that the costs of the application might be allowed to the petitioner out of the same fund.

The

(a) The schedule of fees annexed to the orders referred to, contains the following items:—

£ s. d.

“Upon every sale by the Master, where the purchase-money does not exceed 2000*l.* payable on the report confirmed absolute, by such party as the Master shall direct..... 5 0 0
“For every sale above 2000*l.*, on every 100*l.*..... 0 5 0.”

1825.
 In the Matter
 of ALLEN'S
 Charities.
 April 25.

The Master of the Rolls having directed the Accountant-General to be served with the petition,

Mr. *Cooper* now appeared in support of the petition, and submitted that the Master, in settling the condition of sale, had proceeded upon an erroneous construction of the order. In a case (a) recently before Lord *Lyndhurst* it had been ruled, that the proper fee for any number of lots disposed of at one sale was 5*l.*, if the price of the whole did not exceed 2000*l.*, and 5*s.* for every 100*l.* beyond that sum. The Accountant-General, who had been served, but did not think it necessary to appear by counsel, was satisfied that such was the true construction of the order. With respect to the payment of the petitioner's costs out of the fee fund, the Accountant-General left the matter to the Court.

The MASTER of the ROLLS * made an order according to the prayer, observing, that as the over-payment arose from

(a) The following is the Registrar's note of the case referred to:—

1834.
 Dec. 10.

WINDSOR v. TYRRELL.

UPON an application made by Messrs. *Kindersley*, as solicitors concerned in this cause, against the claim made by Master Sir *G. Wilson* on the sale of the estates in this cause, to a fee of 5*l.* upon every lot sold, where the price did not exceed 2000*l.*, agreeably to the schedule of fees;

The LORD CHANCELLOR decided, that as in this case the estate was sold at one sale, although in a variety of lots, and to different purchasers, the proper fee was one of 5*l.* upon 2000*l.* of purchase-money, and 5*s.* upon every 100*l.* beyond that sum.

* Sir *C. Pepys*.

from the error of the Master in exacting too large a sum, and was not the voluntary act of the petitioner, the latter seemed entitled to his costs.

1835.
In the Matter
of ALLEN's
Charities.

HANBURY v. LITCHFIELD.

ROLLS.
1833.
Nov. 20.

THE Plaintiffs, Messrs. *Hanbury* and Co., brewers, on the 13th of *March* 1830, entered into an agreement with the Defendant, which was in the words following:—Memorandum of agreement made this 13th day of *March* 1830, between *William Litchfield*, of *West End*, in the county of *Middlesex*, and *Samuel Grimsdell*, of *King's Row, Turnham Green*, in the same county, of the one part, and *Thomas Butts Aveling*, of *Spitalfields*, brewer, of the other part; the said *William Litchfield* and *Samuel Grimsdell*, in consideration of the costs and expenses the said *Thomas Butts Aveling* will be at in erecting the messuages and other premises hereinafter mentioned, in the place and stead of the messuage known by the name or sign of the *Horse and Groom*, situate at *Ealing*, in the county of *Middlesex*, do for themselves, their heirs and assigns, hereby agree with the said *Thomas Butts Aveling*, that they, the said *William Litchfield* and *Samuel Grimsdell*, their heirs, executors, or administrators, shall and will, as soon as the premises so agreed to be erected shall be covered in, grant and demise unto the said *Thomas Butts Aveling*, his executors, administrators, or assigns, a lease of the said premises, and of all that site or plot of ground

Under special circumstances, the Plaintiffs, who had entered into an agreement with the Defendants for a lease of thirty-one years, were decreed to accept a legal lease for twenty-one years, and a covenant for a further term of ten years, with compensation for the difference in pecuniary value. Although the bill was framed with a view to a different relief, yet, inasmuch as upon the whole statement of the bill such appeared to be the equity between the parties, the Court, in

order to avoid future litigation, made the decree accordingly, under the prayer for general relief.

1883.
HARVEY
v.
LUXFORD.

ground situate, lying, and being at *Ealing* aforesaid, whereon the said messuage called or known by the name of the *Horse and Groom* now stands, for the term of thirty-one years, to commence from the 29th day of September last, at and under the yearly rent of 60*l.*, payable quarterly; in which said indenture of lease shall be contained, on the part of the said *Thomas Butts Aveling*, as well covenants for payment of rent, land-tax, and all other taxes, of what nature or kind soever, and to deliver up the license to the lessees at the expiration, or other sooner determination of the said term, if such license shall be then subsisting; and also all other covenants and provisoes usually inserted in leases of public-houses. And the said *Thomas Butts Aveling* doth, for himself, his executors, administrators, and assigns, hereby agree forthwith to erect upon the said piece or parcel of ground, a messuage or tenement, coach-house, stables, and other out-buildings, agreeable to, and in conformity with, the specifications made for that purpose, in and by the several plans signed respectively by the several parties to these presents, and to expend in and about the building, and finishing the said premises, the sum of 1000*l.* at the least; and further, that he the said *Thomas Butts Aveling* shall and will accept such lease, without the production of the lessor's title, and execute a counterpart thereof to be prepared by the solicitor of the said *William Litchfield* and *Samuel Grimsdell*, and pay the expenses attendant upon the making and executing this agreement, and such lease and counterpart. — *Thomas Butts Aveling.*"

In the treaty which preceded the agreement, one of the Plaintiffs was informed, by or on the part of the Defendants, that the premises in question, being a public-house at *Ealing*, were of copyhold tenure. Soon after the execution of the agreement the Plaintiffs entered

entered upon the premises, and expended in the rebuilding of them, pursuant to the agreement, upwards of 1100*l.* as they alleged. After this expenditure, and in the year 1832, they applied for a lease of thirty-one years, pursuant to the agreement, when it appeared, that according to the custom of the manor of *Ealing*, the lord could not license a lease for a longer term than twenty-one years. The Defendants proposed to obtain the license of the lord for twenty-one years, and to grant such term to the Plaintiffs, and to enter into a covenant for a further term of ten years. The Plaintiffs refused to accept the proposed lease and covenant; and now filed their bill in order to compel the Defendants to repay the money which they had expended upon the premises, and prayed that it might be declared that they had a lien upon the premises erected by them for the amount of their expenditure, and that, unless such amount was repaid to them by the Defendants, the premises might be sold in or towards its satisfaction.

1833.
Haggar
&
Latham.

Mr. Bickersteth and *Mr. Koe*, for the Plaintiffs.

The Plaintiffs, having contracted for a legal lease, cannot be compelled to accept an equitable lease; neither can they be compelled to accept a legal lease for a part of the term for which they have contracted, with an indemnity, by way of equitable lease, for the remainder of the term. *Balmanno v. Lumley* (a) decides that the Court can neither compel a purchaser to take an indemnity, nor a vendor to give it. This is not a case of defect in the subject of contract, which is capable of equitable compensation; for the difference between the lease which the plaintiffs contracted for, and the lease which the Defendants are capable of granting, amounts

(a) 1 *V. & B.* 224.

1832
HANSBY
v.
LITCHFIELD.

amounts to one third of the whole subject of contract. A covenant for a further term of ten years would afford no sufficient protection to the Plaintiffs; for the Defendants might sell the copyhold, and a purchaser, without notice of the covenant, would not be bound by it. The Plaintiffs are, therefore, clearly entitled to the relief which they pray by their bill.

Mr. Pemberton and Mr. Barber, contra.

This suit has been instituted, not because a legal lease can be granted only for twenty-one years, but because a deterioration has taken place in the value of the property since the passing of the Beer Act in 1830. The Court will not rescind the contract, unless it is satisfied that the difference between the legal term actually contracted for, and the legal term, together with the equitable term offered by the Defendants, is one which cannot be made the subject of compensation. There is, in substance, no difference between the precise subject of contract, and that subject so modified in point of form as the necessity of the case required; for the legal lease for twenty-one years, with the covenant for a further term of ten years, assures to the Plaintiff the whole term as fully as a legal lease for thirty-one years. It is said, indeed, that the covenant would give no security to the Plaintiffs, if the Defendants were to sell the copyhold to a purchaser without notice of the covenant; but there is no foundation for that argument, inasmuch as a purchaser, even if he had no express notice of the covenant, would be bound to inquire into the title of the lessee in possession.

The MASTER of the ROLLS.

There is no question that, if a party enter into an agreement for a legal lease, a court of equity will not compel

compel him to accept an equitable lease, or indemnity for the difference in value; but that doctrine has no application to the present case. I cannot concur in the argument at the bar, that the covenant for a further term is equivalent to a legal lease, and that the Defendants cannot, by a sale of the copyhold to a purchaser without notice of the covenant, defeat the Plaintiffs' right to the further term of ten years. It is true that, where a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title; but if, at the time of his purchase, the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenant contained in the original lease, it has never been considered that it was want of due diligence in the purchaser, which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee, until he arrives at the person entitled to the original lease, which can alone convey to him information of the covenant. If the Plaintiffs in this case, being apprised that the house in question at *Ealing* was copyhold, from whence it was to be inferred that it was held of the manor of *Ealing*, had used the caution which provident persons would have resorted to under such circumstances, they would, before they proceeded to the large expenditure of rebuilding the house, have informed themselves of the custom of the manor with respect to the length of leases, and they have to blame their own want of reasonable diligence for the circumstances in which they are placed. It is not imputed to the Defendants that they acted fraudulently; it was on their part mere ignorance or inadvertence. It is a part of the agreement that the Plaintiffs shall not require the title of the lessor to be produced, and it should seem by the conduct of the solicitors on both sides, that they considered that the Defendants

1833.
 Hanson
 LITCHFIELD.

1888.

 HANBURY
 LITCHELD.

were intended by the expression of "the lessor." If this were the true construction of the agreement, the Plaintiffs' bill must be dismissed, because they would have bound themselves to accept a lease for a term of thirty-one years, whether the Defendants had or had not the power to grant it; and if, in such case, the Plaintiffs were evicted from want of title in the Defendants before the term expired, their remedy would not be in equity, but by such action at law for damages, as the covenants in the lease would enable them to maintain.

This does not, however, appear to me to be a rational construction of the agreement. The Plaintiffs, knowing that the premises were copyhold, and that any lease which the Defendants could grant must emanate from the license of the lord, it is a much more rational construction to say that the lord here was intended by the term "lessor." Upon the whole, therefore, the equity of this case requires that the Plaintiffs should accept the legal lease for twenty-one years, and the covenant for a further term of ten years; and that, as to the difference in value between a legal term of thirty-one years and a legal term of twenty-one years with an equitable term of ten years, the Defendants are bound to make compensation, and let it be referred to the Master to inquire whether there is any and what difference in value between such terms. Considering that this suit has arisen from a want of due diligence on the part of the Plaintiffs, and from ignorance or inadvertence on the part of the Defendants, the decree is made without costs. Although the Plaintiffs' bill is not framed with a view to such a decree, yet, inasmuch as upon the whole statement of the bill, such appears to be the equity between the parties, the Court seems to me to be at liberty to make such decree under the prayer for general relief, and to avoid further litigation upon the subject.

1833

Rolls,
1833.

Nov. 16. 18,
19. 22.

WYTHE v. HENNIKER.

SIR *Brydges Henniker*, by his will, dated the 21st of February 1816, after giving 1000*l.* a year for life to his wife, Lady *Henniker*, in lieu of dower, which annuity he charged upon his *Newton Hall* estate, and appointing, in pursuance of a power given to him by his marriage settlement, the *Grindon* estate, of which he was tenant for life, among his five younger children, devised his *Newton Hall* estate, together with the *Moat House Farm*, and certain land, stated to have been lately purchased by him of Lord *Maynard*, to his eldest son, Sir *Frederick Henniker*, for life, with remainder to his issue in tail, with remainders to his second and other sons successively for life, and remainders in tail to their issue respectively, with divers remainders over.

A testator directed estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of the residue of his personal estate; and he gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children: and the testator afterwards, by a codicil, confined the residuary gift of the produce of the estates directed to be sold, to his

The will proceeded as follows:—“And whereas I have charged my *Newton Hall* estate with the payment of the sum of 6000*l.* by way of mortgage, now I do hereby direct that, in case the said sum of 6000*l.* shall not have been paid off and discharged in my lifetime, the same shall be paid and discharged out of my personal estate, or the money to arise by the sale of my freehold estates hereinafter directed to be sold; and whereas I am seised and possessed of the following freehold and leasehold estates, viz. of a freehold estate

called
younger children: Held, first, that the devisees of the produce of the real estate directed to be sold were entitled to have the personal estate applied in payment of the mortgages; secondly, that pecuniary legatees were entitled to stand in the place of the mortgagees, against the estates so devised, to the extent to which the mortgages had been paid out of the personal estate; and, thirdly, that such pecuniary legatees were not entitled to stand in the place of a vendor to the testator, part of whose purchase-money remained unpaid at the testator's death, to the extent to which the purchase-money had been paid out of the personal estate.

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called *Hoarne Mill*, and *Thorpe Abbotts*, in the counties of *Norfolk* and *Suffolk*, also a freehold farm situate at *Malden*, in the county of *Essex*, also a freehold estate at *Broadstairs*, in the Isle of *Thanet*, in the county of *Kent*, also a leasehold manor and estate called *Bonville*, held by me of the dean and chapter of *Westminster*, and the farms, lands, and hereditaments thereto belonging; now I do hereby give, devise, and bequeath my said last mentioned freehold and leasehold estates unto my said wife, Lady *Henniker*, and my said son, *Frederick Henniker*, and to their heirs, executors, administrators, and assigns, to hold to them respectively upon trust to sell and dispose of the same, either by public auction or private contract; and upon the receipt of the money to arise by the sale thereof, I direct my said wife and son *Frederick* to stand possessed of the same, upon trust, in the first place to pay off and discharge the sum of 6000*l.*, charged, by way of mortgage, on my *Newton Hall* estate, and all interest due thereon; and also, in the next place, to pay off and discharge all other mortgages and incumbrances (if any) charged on any of my other estates hereby devised; and, after full payment of such mortgage-money and interest, I direct that the residue of such purchase-money shall fall into and go and be considered and applied as part of the residue of my personal estate hereinafter given and disposed of." After giving several specific and pecuniary legacies, the testator disposed of the residue of his estate as follows: — "And as to all the rest and residue of my real and personal estates (subject as aforesaid, and also subject to the payment of my just debts), I give, devise, and bequeath the same unto my said wife and son *Frederick*, their heirs, executors, administrators, and assigns, to hold the same to them, their heirs, executors, administrators, and assigns, upon trust that they, &c. do and shall sell and dispose of such parts thereof

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thereof as shall be in the nature thereof saleable, by public auction or private contract, and do and shall use their, her, and his best and utmost endeavours to recover, get in, and receive the rents thereof; and after deducting the expenses attending such sale or sales, recovery and receipts thereof, do and shall, in the first place, pay and discharge my just debts and funeral and testamentary expenses, and after payment thereof do and shall stand possessed of and interested in the clear residue or surplus of such monies, in trust for all and every my children in equal shares and proportions."

1893.
PPRI
WYTH
a. 11
HENNIKER.
HENNIKER

By a codicil to his will, the testator reduced the annuity of 1000*l.* a year, given to Lady *Henniker*, to 700*l.* a year; and, after reciting that he had, by his will, directed that, in case the 6000*l.* mortgage on the *Newton Hall* estate should not be paid off in his lifetime, the same should be paid and discharged out of his personal estate, or the produce of the estates directed to be sold, he proceeded as follows: — "Now I do, in consideration of the said annuity of 1000*l.* to my wife being reduced to the sum of 700*l.* per annum, by which my *Newton Hall* estate will be of more value to my son, *Frederick Henniker*, than when the same was devised to him by my said will, direct that, in order to make a better provision for my younger children, in case the said sum of 6000*l.* shall so remain a charge upon my *Newton Hall* estate at the time of my death, the same shall be raised and paid out of my *Newton Hall* estate, agreeable to the deed of mortgage made thereon, and not out of my personal estate, or out of the sale of my other estates by my said will directed to be sold; and I do hereby further charge my *Newton Hall* estate with the payment of all and every other sum and sums of money that I have, or shall or may hereafter raise upon the same, or that shall be due thereon,

or

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 WYTHE
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or any part thereof, at the time of my death; and I do hereby further direct, that the money to arise by the sale of my said freehold and leasehold estates, so directed to be sold as aforesaid, shall be divided amongst my younger children in equal shares and proportions."

The testator died in *July* 1816, leaving his wife, *Lady Henniker*, *Sir Frederick Henniker*, his eldest son, and five other children, surviving him. *Sir Frederick Henniker* died intestate, and without issue, in 1823; leaving his brother, *Sir Augustus Brydges Henniker*, his heir at law, who thereupon became tenant for life of the settled estates. The bill was filed for the administration of the testator's estate, by *John Wythe* and *Ann* his wife, the eldest daughter of the testator, and their children, against *Lady Henniker*, the surviving executrix of the testator, *Sir Augustus Brydges Henniker*, and all other parties interested under the will.

At the time of the testator's death, a part of the price to be paid for the land, mentioned in the will as having been purchased of *Lord Maynard*, remained undischarged. The material questions in the cause were, whether the personal estate was applicable to the satisfaction of the mortgages directed to be paid out of the produce of the sale of the real estate; and, if so, whether the pecuniary legatees were entitled to stand in the place of the mortgagees to the extent to which the mortgages were paid out of the personal estate; and a further question was made, whether the pecuniary legatees were entitled also to stand in the place of *Lord Maynard*, in respect of the lien which he had on the estate sold by him, so far as the purchase-money had been paid out of the personal estate.

Sir Charles Wetherell, *Mr. Swanston*, *Mr. Wilbraham*, *Mr. Blunt*, and *Mr. Morley*, for the younger children.

Mr.

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Mr. *Bickersteth* and Mr. *Jacob*, for Sir *Augustus B. Henniker*.

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Mr. *Pemberton*, for Lady *Henniker*.

Mr. *Stephenson* and Mr. *H. White*, for other parties.

For the younger children it was argued, first, that the personal estate could only be exonerated from the payment of the mortgages by the express direction of the testator, or by necessary implication from the whole context of the will, and that there was nothing upon the will or codicil to take the present case out of the ordinary rule which applied to a devise of real estate subject to a mortgage. According to the rule which had been invariably followed since the case of *Serle v. St. Eloy* (a), the devisee of an estate subject to a mortgage took the estate exonerated from the mortgage as against the testator's personal estate; and here the gift of the produce of the estates directed to be sold, subject to the application of that produce to the payment of the mortgages, was substantially a gift of the estates to the younger children, subject to the mortgages. It could never be successfully contended that a mere direction to pay off mortgages with the produce of the devised estate amounted to an exoneration of the personal estate; especially in a case where the disposition of the testator's residuary personal estate was made subject to the payment of all his just debts.

Secondly, it was submitted that the right of the pecuniary legatees to have the assets marshalled as against

(a) 2 P. Wms. 386.

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against devisees of real estate, subject to mortgages which had been satisfied out of the personal estate, rested upon the authority of *Forrester v. Leigh* (a), a case which had been decided against principle, and which had often been mentioned with disapprobation.

On the third point it was argued that, if the Court should be of opinion that the pecuniary legatees were entitled to stand in the place of the mortgagees to the extent to which the latter had been paid out of the personal estate, then, by parity of reason, they would have a right to stand in the place of Lord *Maynard* in respect of his lien upon the purchased estate, to the extent to which the purchase-money remaining due to Lord *Maynard* at the testator's death had been satisfied out of the personal estate; and the case of *Pollexfen v. Moore* (b) was relied upon as an authority in support of that proposition. The vendor was a creditor upon the testator's general personal estate, and he had also a lien upon the estate sold, so long as any part of the purchase-money remained unpaid. As Lord *Maynard*, therefore, had been satisfied out of one fund, when he had two funds to resort to, he could not, by his election, disappoint the pecuniary legatees who had but one fund to resort to, and the case fell within the ordinary principle upon which the Court marshalled the assets. In *Austen v. Halsey* (c), Lord *Eldon* referred to *Pollexfen v. Moore*, and he observed, that "where there is a charge upon an estate descended, a legatee shall stand in the place of the person having that charge resorting to the personal estate." In conformity with that principle, Sir *William Grant* decided, in the case of *Trimmer v. Bayne* (d), that

as

(a) *Ambl.* 171.

(b) 3 *Atk.* 272.

(c) 6 *Ves.* 483.

(d) 9 *Ves.* 209.

as against a descended estate a pecuniary legatee had a right to stand in the place of the vendor in respect of his lien upon the purchased estate. In *Selby v. Selby* (a), a case recently before the Court, his Honor held, under circumstances similar to those of the present case, that a simple contract creditor was entitled to stand in the place of the vendor, in respect of his lien upon the estate sold, against the devisee of that estate, because the vendor had equally a charge upon the double fund of the real and personal estate. That reason was equally applicable to the case of a pecuniary legatee; and in fact the very point now before the Court, though it was not necessary to decide it, was alluded to in *Selby v. Selby* by his Honor, who observed, that "if the charge of the vendor was to be considered in the same manner as if it were secured by mortgage, then a pecuniary legatee would have the same benefit from the vendor's lien." Now, the vendor and the mortgagee had an equal right to resort to the two funds, and it seemed impossible, for the purpose of determining the right of the pecuniary legatees in respect of marshalling, to distinguish the lien of the one from the charge of the other.

On the other side it was admitted to be the general rule, that a devise of estates subject to a mortgage did not affect the primary liability of the personal estate to the payment of the mortgage debt; but it was insisted that in the present case the intention of the testator to exonerate his personal estate was plainly to be collected from the language of the will and codicil. The testator had, by his will, charged his personal estate, and the produce of the estates directed to be sold, with the payment of the mortgage upon the *Newton Hall* estate, and by his codicil he had expressly declared his intention of revoking that part of his will, and of making the *Newton Hall* estate

(a) 4 Russ. 336.

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WYTHE
v.
HENNIKER.

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v.
HERRICK.

estate liable to the payment of the mortgages upon it in exoneration of the personal estate. How, therefore, could it be held that the personal estate, notwithstanding the codicil, continued primarily liable to the payment of the mortgages, without directly contravening the declared intention of the testator?

As to the second point, the case of *Forrester v. Leigh* established the rule, that pecuniary legatees were entitled to stand in the place of mortgagees as against devisees of mortgaged estates, to the extent to which the mortgages had been satisfied out of personal estate, and that rule could not now be departed from without affecting the stability of a great number of titles.

The point, indeed, did not appear to be seriously contested, for the third question raised on the other side was founded on the supposition or admission that the second was untenable. Although the rule established by *Forrester v. Leigh* was not to be shaken, yet it could not be denied that it was difficult to reconcile the decision in that case with the principle recognised in other cases, that a devise of an estate subject to a mortgage was a devise of the whole estate, and not a gift of the mere equity of redemption. It would be dangerous to depart from the rule established in *Forrester v. Leigh*; but the claim of a pecuniary legatee to have the assets marshalled against the devisee ought not, without necessity, to be carried further. *Pollexfen v. Moore* was an anomalous case, and was considered of doubtful authority both by Lord Eldon and Sir William Grant. *Mackreth v. Symmons* (a), *Trimmer v. Bayne*. (b) The author of the treatise on the law of *Vendors and Purchasers* (c) had endeavoured to reconcile the decision in that

(a) 15 Ves. 344.

(b) 9 Ves. 209.

(c) Vol. 2. p. 70. 9th edit.

that case with the *dictum* of Lord *Hardwicke* that the benefit of the vendor's lien would not extend to third persons, upon the conjecture that the decree went upon the circumstance that the vendor had not parted with the title deeds, but had, by agreement, kept them in his own custody, as a security for the purchase-money unpaid; so that he stood in the situation of an equitable mortgagee, and the case fell therefore within the general rule as to marshalling. If that conjecture were right, the case would be wholly inapplicable to the purpose for which it was here used; and if the circumstance supposed to be sufficient to account for the discrepancy between the *dictum* and the decree in *Pollexfen v. Moore* were not the ground of Lord *Hardwicke's* decree, the case would be left in all that obscurity, by which Sir *William Grant* confesses that he had been much perplexed, in *Trimmer v. Bayne* (a), and which rendered it at any rate an unsafe authority for the introduction of a new rule in the marshalling of assets. It was true that in *Trimmer v. Bayne* the benefit of the vendor's lien was extended to a pecuniary legatee; but in that case the estate, against which the marshalling was allowed, was a descended estate, and the pecuniary legatee and heir were not, as in the case of pecuniary legatee and devisee, equal objects of the testator's bounty.

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 v.
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The MASTER of the ROLLS.

Nov. 22.

The first question is, upon the will, immaterial, because the residue of the estates directed to be sold, and the residue of the personal estate, were given to the same persons. It has been made material by the codicil which gives the residue of the estates to be sold to the
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(a) *Trimmer v. Bayne*, 9 Ves. 211.

1838.
 Wynn v.
 Hannibal

five younger children only, in exclusion of the eldest, leaving the residue of the personal estate distributable among the six children. The devise of the estates, to be sold for the payment of the mortgages, is in effect a gift of those estates to the five younger children, subject to the mortgages; and a gift of an estate subject to a mortgage does not deprive the devisee of the right to satisfaction of the mortgage out of the personal estate. There is here no intention to exonerate the personal estate from the payment of the mortgages, the residue of the personal estate being expressly given after payment of all his just debts; and it is plain the testator intended the produce of the real estate as an auxiliary fund only, from the direction in the will that the 6000*l.* mortgage on the *Newton Hall* estate should be paid out of the personal estate, or out of the produce of the real estates devised to be sold.

Upon the second question, I do not think it necessary to refer to the argument impeaching the doctrine of *Forrester v. Leigh*, considering it to have been received, ever since that case, as a settled rule of Courts of Equity, that a pecuniary legatee is entitled to stand upon the devised estate in the place of the mortgagee, to the extent to which the mortgage has been satisfied out of the personal estate. That doctrine proceeds upon the assumption that the devise of the mortgaged estate is a devise of the equity of redemption only, and that the testator intended that the devisee should take the estate *cum onere*. That doctrine, however, has not been universally approved, because in all other cases the devisee of a mortgaged estate does not take it *cum onere*, but has a right to have the mortgage satisfied out of the personal estate, even where the devise is made expressly subject to the mortgage. Following the rule of the Court settled by *Forrester v. Leigh*, I must therefore here declare that the pecuniary legatees
 are

are entitled to stand in the place of the mortgagees upon the devised estate, to the extent to which the mortgages have been paid out of the personal estate.

1893.

WYTHE
v.
HENNIKER.

The third question arises from the fact, that the testator, by his will, devised an estate which he had purchased of Lord *Maynard*, and that a part of the price of that estate remained unpaid at the testator's death; and it was argued that Lord *Maynard*, the vendor, having been since paid what was due to him out of the personal estate, the pecuniary legatees have a right to stand in the place of Lord *Maynard*, in respect of his lien upon the purchased estate, to the extent of the sum he has received from the personal estate. The case of *Clifton v. Burt* (a) has established, that a pecuniary legatee has no right to stand in the place of a bond creditor as against a real estate devised, although he has such right as against a real estate descended, it being considered that the devisee is not to be deprived of any part of the real estate which the testator has given him, because it happens that the testator's intention of bounty towards the pecuniary legatee fails for want of that fund which ought legally to supply the legacy. If in this case the estate purchased of Lord *Maynard* had descended instead of being devised, then indeed the pecuniary legatees would have been entitled to stand in the place of Lord *Maynard* upon the descended estate within the principle of *Clifton v. Burt*.

In the case of *Pollexfen v. Moore*, which is cited in support of the proposition contended for, a testator gave a pecuniary legacy to his sister, and devised his real estate to *Kemp*, whom he made executor. *Kemp* wasted the personal assets, which appear to have been sufficient to pay the legacy, and died leaving the legacy unpaid,
and

(a) 1 P. Wms. 678.

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and the real estate which he had acquired from the first testator descended to his son and heir; and the decision in that case was, that, because *Kemp* the father had wasted the assets which ought to have paid the legatee, the legatee should charge the heir of *Kemp* in respect of the real estate. Lord *Hardwicke* decreed satisfaction to the legatee out of the descended estate, upon the ground that the legatee was entitled to the same relief against him as she would have been entitled to against the father. This decision, therefore, has not only no application to the purpose for which it was cited, but it is difficult to find any principle upon which it can be supported; because the wasting of the assets which ought to have satisfied the legacy could only constitute a simple contract debt against *Kemp* the father, to be satisfied out of his personal estate if he had left personal estate, and could not affect his real estate descended. This case of *Pollexfen v. Moore* was referred to by Sir *W. Grant* in *Trimmer v. Bayne*, where the pecuniary legatee was decreed to stand in the place of the heir upon a descended but not a devised estate; and it is noticed by Lord *Eldon* in *Austen v. Halscy*, and in *Mackreth v. Symmons*. Sir *William Grant* in *Trimmer v. Bayne* observes, — and there is abundant reason for the observation — that the case of *Pollexfen v. Moore* had greatly perplexed him.

It must therefore be declared that the pecuniary legatees have no right to stand in the place of Lord *Maynard* in respect of his lien upon the estate purchased by the testator.

1832

ATTORNEY-GENERAL v. GASCOIGNE.

Rot. 18.
1832.
Jan. 18.
1833.
Dec. 3.

ROBERT HUNGATE, by his will, dated the 11th of May 1620, after reciting that large sums of money were due and owing to him, and declaring his will to be that the several sums of 900*l.*, 700*l.*, and 1300*l.* should in case of payment thereof be accepted from the several persons indebted to him as therein mentioned, in discharge and satisfaction of the debts due by them, directed that his executors thereafter-mentioned should from time to time employ the said sums of money to the uses thereafter appointed, and that they and their heirs, presently after the receipt of the said sums or of any part thereof, amounting to the sum of 100*l.* or above, should with all convenient speed from time to time buy and purchase to them and their heirs lands, tenements, and hereditaments of so much yearly value as *bona fide* so much monies would purchase in fee-simple, upon the confidence and trust that his said executors and their heirs should for ever thereafter employ the yearly profits of the said lands, tenements, and hereditaments so from time to time to be purchased, unto such godly uses and purposes as thereafter expressed and set down, and no other use and uses; that is to say, that the executors and the survivor of them and their heirs should, within five years next after his death, erect, build, and found one convenient house or hospital, with a convenient school-house and rooms, to have continuance for ever, within the town of *Saxton*, or in the town of *Sherburn*, for legitimate orphans and infants only above seven or under fifteen years old, to consist of the number of twenty-four orphans at one time, and every one of them to have yearly allowed and paid for their maintenance

Where the surplus of the rents and profits of an estate, charged with certain stipulated payments for the benefit of a charity, is expressly devised by the will of the founder to his executors and their heirs, for their sole use and benefit for ever, the charity can claim only the stipulated payments, although, by the change in the value of money, such payments have become inadequate to the charitable intentions of the founder. The teaching of writing and arithmetic may be well introduced into a scheme for the management of a free grammar school.

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there the sum of 5*l.* a year for ever; also to provide and place one able schoolmaster, being a preaching minister, to instruct the said orphans there yearly, for ever, in the art of grammar; and to catechise the said orphans in the grounds of the Christian religion, established in *England*, twice every week, and to preach once on every Sabbath in the parish church, where the said hospital should be erected, yearly for ever. The said schoolmaster and instructor and his successors to have a convenient room there for his lodgment, and for his salary yearly 30*l.* for ever. And that there should also be a convenient usher, who was to have yearly for his stipend the sum of 20 marks for ever. And the testator's will was that the said orphans, and schoolmaster, preacher, and usher should be from time to time elected and chosen by his executors and the survivor of them, and after their death by the heir male of the body of *William Hengate* his late father, if he were no popish recusant; and that the orphans and infants of the said towns of *Saxton* and *Sherburn* should be first preferred, and after them the orphans and infants of *Sand Hutton*, and after them some of the City of *York* or elsewhere; and in default of such heir male of the body of his said late father, or if such heir male should be a popish recusant, or if there were any default in choosing and placing such schoolmaster, preacher, usher, and orphans, his will was, that the Dean of *York* for the time being should nominate, choose, and place such schoolmaster, preacher, usher, infants, and orphans in the said hospital as should be wanting, until there should be some other issue or heir male of the body of his father, being no popish recusant, to nominate and appoint them. The will then directed that 40 marks should be yearly paid by his executors and their heirs for ever out of the profits of the lands so to be purchased for and towards the maintenance of four poor scholars in *St. John's College* in *Cambridge*,

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Cambridge, which should be sent from the said hospital and school; and no orphan or infant was to abide in the hospital longer than until he or she should be of the full age of fifteen years and a half at the most; but they should before and within that time, from time to time, as they should be apt and fit, be sent to the university, or be placed apprentices to some other honest course of life within this commonwealth. And the testator directed that the aforesaid hospital being so erected and founded, and the said several payments and stipends being from time to time first duly paid, the residue of the yearly value of the said lands, so appointed to be purchased with all the said sums of money, should remain and continue unto his said executors, their heirs and assigns, for ever, and to their sole and proper use for ever. And the testator appointed his nephew *Sir William Hungate*, and his niece *Margery Hungate*, joint executors of his will.

1852.

 Attorney,
 General,
 of
 the Court of Chancery.

Sir William Hungate, the executor, invested the sums mentioned in the will of the testator in the purchase of lands, which, in 1628, were conveyed to the use of the charity, and then produced yearly rents, amounting to upwards of 250*l.*, the several payments directed by the will amounting to 263*l.* 6*s.* 8*d.*; and *Sir William Hungate* at the same time provided a school-house.

In the year 1671, the charity was endowed by one *Francis Thornhill* with land, which was thereupon demised by the trustees of the charity to the same *Francis Thornhill* for a term of 1000 years, at a rent of 10*l.*

Sir William Hungate, having survived the executrix, *Mary Hungate*, acted as the patron of the charity until his death, in 1635; and the heir male of the body of the testator's father being then a Papist, the Dean of *York* for the time being acted as the patron of the

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charity until 1780. In 1780, Sir *Thomas Gascoigne*, whose father had married the heiress of the *Hungate* estates, and had become entitled to the estate charged with the payments to the charity, conformed to the Protestant religion, and from thence, until his death, acted as the patron of the charity. In the year 1770, Sir *Thomas Gascoigne* obtained an act of parliament for inclosing, amongst other lands, the estate charged with the payment to the charity; and thereupon, by the interference of the then Dean of *York*, Sir *Thomas* being at that time a Papist, it was provided by the act which recognised the title of the owner of the estate charged with the stipulated payments to the surplus rents of that estate, that, in respect of the benefit which Sir *Thomas Gascoigne* derived from the inclosure, the charity payments should be increased by a further yearly payment of 12*l.*

Sir *Thomas Gascoigne* became by purchase the owner of the lease, which had been granted as before stated to *Francis Thornhill*.

In 1810 Sir *Thomas Gascoigne* died; and thereupon the Defendant, *Richard Oliver Gascoigne*, came into possession of the lands charged with the payments to the charity, as tenant for life under the will of Sir *Thomas Gascoigne*, and from the time of such possession the payments made by him to the charity were upwards of 50*l.* a year less than the amount of the payments directed by the will of the founder. In consequence of this diminished payment, and the altered value of money, the intentions of the founder were in a great measure defeated. The income of the estates charged with the charitable payments amounted, at the time of filing the information, to 800*l.* a year, and the object of the information was to have the whole rents of those estates applied to

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to the purposes of the charity by a scheme to be settled by the Master.

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Mr. Tinney and Mr. O. Anderdon, in support of the information.

Mr. Bickersteth, Mr. Pemberton, Mr. Treslove, Mr. Skirrow, Mr. Moore, Mr. Round, and Mr. Monro, for the respective Defendants.

The MASTER of the ROLLS.

The surplus rents of the estate to be purchased, being by the will of the founder expressly devised, subject to the payments mentioned in the will, to his executors, and their heirs, to and for their sole and perpetual use for ever, no further sum than those specified payments, with the addition of the two sums of 10*l.* and 12*l.* in respect of the property devised by *Francis Thornhill*, can be claimed for the charity. If a court of justice were to provide for that change in the value of money, which the testator had not in his contemplation, it would not be to construe the will, but to make a new will for the testator.

His Honor decided, however, that in addition to the stipulated payments, the owner of the estate was bound, at his own expense, to maintain and keep the school-house in good repair, and to pay for the fitting up and furnishing of the school, and to find the school-books and also the necessary furniture and bedding for the lodging of the scholars so far as the yearly sum of 12*l.* mentioned in the inclosure act was not adequate to that purpose; and he directed the Defendant, *Richard Oliver Gascoigne*, to account for the amount of the stipulated payments from the time of his possession, and

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to pay the costs of the information; and referred it to the Master to settle a scheme for the future management of the charity.

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 into a scheme
 for the ma-
 nagement of a
 free grammar
 school.

On the case coming on for further directions on the Master's report, a question was raised as to the propriety of the introduction of a provision for the teaching of writing and arithmetic into the scheme for the management of the grammar-school.

Mr. Penderton, for the relators, said the only ground which had been relied upon in any of the cases for the exclusion of such subjects of instruction as were best fitted for commercial purposes from the education to be given at grammar-schools, was this;—that instruction in such subjects was inconsistent with the nature of the institution. It was assumed that the teaching of grammar meant nothing but the teaching of the learned languages, and that to give instruction in writing and arithmetic, those parts of education which were most useful, and most wanted by a large proportion of the objects of those charitable institutions, would be to divert the charity from the purpose contemplated by the founder. It was true, that in this case, the art of grammar was the only subject of instruction expressly mentioned by the testator: but it was no less true that the charity was intended as well for scholars who were to be placed out apprentices to some honest trade, as for scholars who were to be sent to the University. In the late case of *The Attorney General v. The Haberdashers' Company &c.*, Lord Lyndhurst had approved of the introduction of a provision for giving in-

struction

struction in writing and arithmetic into a scheme for the administration of a free grammar-school.

The MASTER of the ROLLS said that, considering the number of foundations of this description in various parts of the kingdom, and the wants of the inhabitants in many places where they were situated, nothing could be more inconvenient than the confinement of the subject of instruction to the learned languages. The restricted interpretation of the word "grammar;" and the consequent restriction of the subjects taught at grammar-schools, had, no doubt, been sanctioned by very high authority; but he was glad of an opportunity of holding, upon the authority of the case before him, *Lord Lyndhurst* cited at the bar, that the teaching of writing and arithmetic might be well introduced into a scheme for the management of a free grammar-school.

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Attorney-General v. Gasecocks

1838

Attorney-General v. Gasecocks

1888.]

REYNOLDS
v. MERCEYS

Rolls.

1888.

Jan. 17.

-ATTORNEY-GENERAL v. The MERCERS'
COMPANY.

Where money had been bequeathed for the purpose of being lent out without interest, in sums not exceeding 200*l.*, and the Master, in settling a new scheme for the charity, had directed the maximum of the sums so lent out to be 500*l.*; it was held, that as the latest of the wills was 200 years old, the increase in the amount of the loans was not inconsistent with the intention of the testators.

The costs of an information must be paid by a company, in which a charitable fund is vested, if the charity be suffered to fall into disuetude.

THIS information had been filed for the purpose of effecting a due application of the sum of 2850*l.*, being the amount of a number of legacies, which had been left to the *Mercers' Company* by various testators between the years 1545 and 1666, for the purpose of being lent out in sums, varying from 5*l.* to 200*l.* without interest to young freemen of the Company. From the year 1666, in which the fire of *London* happened, the funds had remained unapplied in the hands of the *Mercers' Company*.

At the hearing of the cause, a reference had been directed to the Master to settle a scheme, for the due application of the fund; and the scheme settled by the Master provided, among other things, that the fund should be lent out to young freemen of the company, in sums not less than 100*l.*, and not exceeding 500*l.*, without interest, upon bond with two good securities.

The MASTER of the Rolls was at first inclined to think that the sum of 500*l.* was too large, since the largest sum mentioned in any of the wills was 200*l.*, and the loan of sums so considerable as 500*l.* would become an object of importance to families, and might consequently lead to the abuse of the charity. But, it being suggested at the bar, that the latest of the wills was 200 years old, his Honor was finally of opinion that, regard being had to the alteration in the value of money, the increase in the amount of the loans made by the Master's scheme was not inconsistent with the intention of the testator.

His

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His Honor directed the costs of the information to be paid by the company, with the exception of such expenses of the reference to the Master as were occasioned by the necessity of settling a new scheme, ~~inasmuch as~~ it was by their neglect that the charity had fallen into desuetude, and their general estate had profited by the non-application of the fund.

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The
MERCERS'
Company.

DOCKER v. SOMES.

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April 17. 19.
22.

SAMUEL SOMES, an extensive shipowner at *Mile End*, bequeathed his property, consisting, among other things, of a ship and of shares in several other ships, to his sons, *Samuel F. Somes*, and *Joseph Somes*, whom he also appointed his executors, upon trust, subject to certain legacies and annuities, for the benefit of his six children, in manner therein mentioned. His will contained a proviso, that if they should think it advantageous for his estate, his trustees might carry on his shipping business for any period not exceeding six years from his decease, and might employ in it such capital as was then employed therein, or such greater capital taken from the rest of his property as they should think fit, and that the profits of the business so carried on should be added to the rest of his property and be considered as part thereof, and distributed accordingly.

If a trustee mixes trust funds with his private monies, and employs both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed.

The testator died in the month of *November* 1816.

The trustees paid some of the legacies; but instead of winding up and closing the testator's concerns, they continued to carry on his shipping business during the six years,

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years, considering that such a course would be more beneficial to the estate. Some of the shipping property, however, they from time to time disposed of. The concern eventually proved to be a losing one; and, in consequence of the general depreciation of shipping property, the testator's estate was worth less at the expiration of the six years than at the time of his decease.

The bill was filed by one of the testator's daughters, after the six years had expired, against the executors and trustees, for an account and payment of her distributive share.

The Defendants by their answer admitted, that within a year after the testator's death they began to carry on the business of ship chandlers and sail-makers in partnership together; and they further admitted, that in the month of *February* 1820, they received the sum of 2775*l.* on account of the testator's share in a ship, which sum, they stated, was again shortly afterwards employed for the benefit of the testator's estate; and they further admitted that in the course of winding up and settling the concerns of the testator's estate, they received divers sums of money for which they had charged themselves with interest at the rate of 5 per cent. from the time of receiving the same, and that such sums were paid in by them at their banker's to the credit of their general account, without distinguishing the same from the monies employed in their own business, conceiving that as the testator's estate was benefited by receiving a higher rate of interest than could have been obtained on government or real securities, and as they were then making arrangements for putting an end to the shipping business, and finally settling all the concerns of the testator's estate, such a temporary disposition of his assets was for the benefit of the persons interested therein, and therefore not objectionable or improper.

By

By the decree made by the Vice-Chancellor at the hearing of the cause, it was (among other things) declared that the sums on which the Defendants had charged themselves with interest at the rate of 5 per cent. per annum, as mentioned in their answer, were to be considered as employed in their trades, and the Master was directed to inquire what proportion of the profits received by the Defendants from such trades was properly attributable to the monies so to be considered as employed in their trades.

An appeal was presented against that part of His Honor's decree.

The *Solicitor-General* (Sir C. Pepys) and Mr. *Blenden*, in support of the appeal.

The ground on which the Vice-Chancellor proceeded was, that certain balances, admitted to form part of the testator's estate, had been mixed by the Defendants with their own monies and paid in to one general account at their banker's, and that, as their occasions required, the Defendants drew upon that account as well to answer their current expenditure in their ship chandlery and sailmaking concerns, as in carrying on the shipping business, which under the will they were authorised to continue. His Honor considered that the Defendants in adopting this course were using the assets of the testator for the purposes of their own trade; and that although they had charged themselves by their answer with interest at 5 per cent. on the amount of the sums so employed (a larger interest than could have been obtained from any other investment), they were bound nevertheless to account for all the profits derived in their trade from the use of those sums. The effect of this declaration is to make the *cestuique trusts* of the testator's estate

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estate substantially partners in the private trade of the Defendants as ship chandlers and sail-makers, at least to the extent of entitling them to share the profits derived from such part of the capital employed in it as had once belonged to the testator's assets. Such a declaration, besides being in the highest decree inconvenient, is totally unwarranted by precedent. The only authority that can be cited to support it is *Brown v. De Tastet* (a), but the circumstances there were extremely peculiar. The bill in that case was filed for an account of an intestate's assets, alleging that *De Tastet* had continued to carry on the intestate's trade with the capital of the intestate, his deceased partner; and the Defendant having by his answer admitted that he had made profits in the trade by the use of that capital, the decree ordered him to account for the profits. The principle of the decree was that it did not lie in *De Tastet's* mouth to say that the trade had determined by his partner's death, because, as his own answer admitted, he had continued the trade, with all the advantages of the capital belonging to his deceased partner, and had not attempted to wind up the concern or to sever the partnership. The decree was afterwards carried to the House of Lords and affirmed, but it was found in practice quite impossible to work it, and the Plaintiff, it is believed, eventually abandoned it.

The practical inconvenience of going into complicated accounts for the purpose of separating the profits produced by the trader's own capital from the profits derived from the money he has borrowed from the trust, would alone be a conclusive objection to His Honor's order; and this consideration has probably given rise to the rule now firmly established, that whenever a trustee, who

(a) *Jac.* 284. 4 *Russ.* 126.

who is himself in trade, mixes the trust funds with his private monies, and employs them in both, in a business or adventure of his own, he shall be charged with interest upon the trust funds so appropriated. The rate of interest charged may, however, vary. If circumstances appear to palliate or excuse the conduct of the trustee, the Court will charge him with interest at 4 per cent. only; *Tebbs v. Carpenter*. (a) If the breach of trust is aggravated and inexcusable, interest at 5 per cent. will be charged; *Piety v. Stace* (b), *Newton v. Bennet* (c), *Treves v. Townshend* (d), *Sutton v. Sharp* (e), *The Attorney-General v. Solly*. (g) In *Raphael v. Boehm* (h) before Lord Loughborough, an account of interest at 5 per cent. with half yearly rests was directed; but this, which has always been considered as a harsh decree, has not been followed since, and the current of authorities warrants the proposition that, in all ordinary cases, interest at 5 per cent. upon the sum appropriated is the extent and measure of the trustee's liability.

1824.
Doonth
s.
Somed.

Here every thing concurred to extenuate, if not to justify, the course pursued by the Defendants. In the exercise of the discretion vested in them by the will, they considered it expedient to carry on the testator's business; and they, therefore, retained his interest in the shipping property. With a view to put his vessels in a fit state for employment, they were obliged from time to time to incur considerable expenses, to meet which, it became necessary to keep in hand an available balance of the testator's assets. This balance they deposited at their banker's; and, as they kept but one account there, and were themselves then engaged in a distinct business of their own, some portion of the funds

derived

(a) 1 *Mad.* 290.

(b) 4 *Ves.* 620.

(c) 1 *Bro. C. C.* 359.

(d) *Ibid.* 384.

(e) 1 *Russ.* 146.

(g) 2 *Sim.* 518.

(h) Stated in 11 *Ves.* 92., and in 1 *Mad.* 300.

1884.

*Booker
v.
Booker.*

derived from the profits of the shipping business, or from the sale of the ships (which they were gradually disposing of), may have been drawn out in the ordinary course, and occasionally employed in the chandlery and sail-making concern; but for the sums thus employed, which were small in amount, and must otherwise have lain unproductive, the 5 per cent. interest allowed by the Defendants is surely a most liberal return.

Mr. Boteler and Mr. Bigg, in support of the decree.

Except the case of *Brown v. De Tastet*, which is strictly in point, it may be difficult to find a precedent which applies directly to the present case; but the doctrine laid down in a variety of cases, and still more the principles upon which the Court has uniformly acted in dealing with trustees who have been guilty of a breach of trust, are strongly in favour of the Vice-Chancellor's decree. It is settled that a trustee shall not be allowed to charge or receive remuneration for the time or trouble he may have expended in the execution of his trust: *Robinson v. Pett* (a), *Sheriff v. Axe* (b), *Hovey v. Blakeman* (c); and it is equally clear, that whatever profit has been made by the application of a trust fund, must be added to and form part of the principal of that fund; the rule being, that a person shall not be permitted, either directly or indirectly, to derive a benefit to himself from his character of trustee. If, therefore, a speculation in which a trustee has, without authority, embarked funds belonging to the trust, proves unfortunate, the loss is entirely his own; if it proves successful, the gain is that of *cestuique trust*. The application of this principle is easy, wherever the monies so applied are not mixed by the trustee with

(a) 3 P. Wms. 249.

(b) 4 Russ. 33.

(c) 4 Ves. 596.

with his own, but are employed in a distinct trade or adventure; and there the practice has been universal to charge him at the election of the *cestui que trust*, either with interest at 5 per cent., or with all the profits, if any have been made. Where, again, the profits are the produce of a mixed capital, partly composed of trust monies, and partly of the trader's own monies, it may be more difficult to sever the shares attributable to each portion of the capital; but the difficulty which the act of the trustee guilty of the breach of trust has himself created, is no answer to the claim of the *cestui que trust*, if the latter chooses to insist upon his rights. The trustee, in such a case, cannot take advantage of his own wrong, or shield himself from rendering an account of his gains by an offer of 5 per cent. interest upon the sums he has improperly put in hazard. *Freeman v. Fairlie*. (a)

No judge has taken the distinction, now for the first time suggested, between the case of trust funds mixed by the trustee with his private money, and employed with it in a business of his own, and the case of trust-funds not so mixed, but employed by the trustee in a separate concern or adventure. On the contrary, the common language of the Court, and the inquiries directed by decrees dealing with questions of this kind, clearly indicate that no such distinction exists, and that in both cases equally, the *cestui que trust* may either insist on going into the account of the profits, or, if he considers that course inconvenient, may waive the account, and claim interest at 5 per cent. upon the funds misapplied: *Hockley v. Bantock* (b), *Walker v. Woodward* (c), *Heathcote v. Hulme* (d), *Burden v. Burden*,

(a) 3 Mer. 24.; see p. 43.

(c) 1 Russ. 107.

(b) 1 Russ. 141.

(d) 1 Jac. & W. 122.

1881.
Decree
Saves

1834.

Decker
v.
Somers.

v. *Burden*(a), *Pocock v. Reddington*(b), *Bate v. Scales*.(c)
The option, however, is exclusively given for the benefit of the *cestui que trust* whose property has been endangered; and to extend it to the party whose culpable conduct has occasioned all the difficulty and the danger, would be to hold out to trustees the most powerful encouragement to fraud and malversation in the discharge of their office.

April 22.

The LORD CHANCELLOR.

The importance of the question raised upon this appeal, independently of its novelty, would be fully sufficient to make me feel some anxiety in deciding it; and this anxiety is not lessened by the consideration that the question is now for the first time to receive a judicial determination.

There is clearly no decided case upon the point; none which even touches it more nearly than by recognising general principles. Certainly there is no decision allowing an account of actual profits. Indeed it may rather be said, that the cases, by uniformly giving interest at different rates, and sometimes with rests where the trust-funds have been employed in the trustee's trade, would seem to acknowledge the principle that no account of actual profits shall be given in such instances.

Thus, in *Newton v. Bennet*(d), where an executor had used the produce of the testator's estate in his trade, interest was allowed; and so in the *Attorney-General*

(a) Cited in 1 *Jac. & W.* 134.(b) 5 *Ves.* 794.(c) 12 *Ves.* 402. See also *ex parte Watson*, 2 *Ves. & B.* 414.(d) 1 *Bro. C. C.* 359.

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General v. Solly (a), and other cases. But the strongest instance is *Raphael v. Boehm*, before Lord *Loughborough* in 1798, a case which, upon that point, is nowhere reported, but which is particularly mentioned in *Tebbs v. Carpenter* (b) by the Vice-Chancellor, who had taken time to examine the Registrar's book. It came also before Lord *Eldon* and Lord *Erskine* in subsequent stages of the cause. (c) In that case a gross breach of trust had been committed; for the large sum of 30,000*l.* was expressly directed to be laid out for accumulation, and the executor having thought proper to employ it in his own trade, the Court ordered him to be charged with interest at 5 per cent. from the time of the testator's death, with half-yearly rests and interest for the intermediate times. All the judges, who have mentioned this decree, have considered it as severe: and certainly it proceeded from a strong feeling in the Court that a breach of trust had been committed, so aggravated as to call for the most severe visitation.

1881
1894
DOCK
DOCK
DOCK

It is hence not unnaturally argued that the utmost power of the Court had been exerted upon this occasion; and an opinion forces itself almost unavoidably upon us, that the Court must have felt its authority limited to the allowing of interest. If, in every case of such misconduct, the appropriation of the trust-funds has been only visited by charging interest, the inference seems reasonable enough that this was the extent to which the Court felt itself at liberty to go in any instance of the like malversation.

In the absence of any precedent of a decree for an account of actual profits, whatever may have been the culpability

(a) 2 *Sim.* 518.

(c) 11 *Ves.* 92. 13 *Ves.* 407.

(b) 1 *Mad.* 300.

590.

1894.

Buck

v.

Gard.

culpability of the trustee in exposing the trust-funds to hazard in quest of his own gain, there seems good ground for holding that, as far as the authority of judicial determination goes, the weight lies on one side, and that the rule is, to give interest and nothing else in cases of this kind. Let us, however, refer for a moment to the undoubted principles that regulate the dealings of the Court with breaches of trust, and see to what these plainly lead us.

Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust-estate for his own behoof, the rule is, that he shall account to the *cestui que trust* for all the gain which he has made. Thus, if trust-money is laid out in buying and selling land, and a profit made by the transaction, that shall go not to the trustee who has so applied the money, but to the *cestui que trust* whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself; yet for every farthing of profit he may make he shall be accountable to the trust estate. So, if he lay out the trust-money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern. In all these cases, it is easy to tell what the gains are; the fund is kept distinct from the trustee's other monies, and whatever he gets, he must account for and pay over. It is so much fruit, so much increase on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor.

prietor. So it is also where one not expressly a trustee has bought or trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable. If a person has purchased land in his own name with my money, there is a resulting trust for me; if he has invested my money in any other speculation without my consent, he is held as a trustee for my benefit; and so an attorney, guardian, or other person standing in a like situation to another gains not for himself, but for the client, or infant, or other party whose confidence has been abused.

1834.
Dress
v.
Saves.

Such being the undeniable principle of equity, such the rule by which breach of trust is discouraged and punished—discouraged by intercepting its gains, and thus frustrating the intentions that caused it; punished by charging all losses on the wrongdoer, while no profit can ever accrue to him—can the Court consistently draw the line as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent; those instances where the trustee is most likely to misappropriate; namely, those in which he uses the trust funds in his own traffic? At first sight this seems grossly absurd, and some reflection is required to understand how the Court could ever, even in appearance, countenance such an anomaly. The reason which has induced judges to be satisfied with allowing interest only, I take to have been this: they could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock; and the process became still more difficult, where a great proportion of the gains proceeded from skill or labour employed upon the capital. In cases of separate appropriation there was no such difficulty; as where land or stock had been bought and then sold again at a profit; and here, accord-

1834:

Deane
v.
Sims.

ingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money in that trade along with his own, there was so much difficulty in severing the profits which might be supposed to come from the money misapplied from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course, and instead of endeavouring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profits, and assign that to the trust estate.

This principle is undoubtedly attended with one advantage; it avoids the necessity of an investigation, of more or less nicety in each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and of expediency are made for this convenience. All trust estates receive the same compensation, whatever risks they may have run during the period of their misappropriation: all profit equally, whatever may be the real gain derived by the trustee from his breach of duty; nor can any amount of profit made be reached by the Court, or even the most moderate rate of mercantile profit, that is the legal rate of interest, be exceeded, whatever the actual gains may have been, unless by the very clumsy and arbitrary method of allowing rests, in other words, compound interest; and this without the least regard to the profits actually realized: for, in the most remarkable case in which this method has been resorted to, *Esquivel v. Burtin*, (which, indeed, is always cited to be doubted, if not disapproved,) the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it.

But

But the principal objection which I have to the rule is founded upon its tendency to cripple the just power of this Court in by far the most wholesome and indeed necessary exercise of its functions, and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversations, that the contrivers of sordid injustice feel the power of the Court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores? It is in vain they are told of the Court's arm being long enough to reach them, and strong enough to hold them, if they know that a certain delicacy of touch is required, without which the hand might as well be paralysed or shrunk up. The distinction, I will not say sanctioned, but pointed at by the negative authority of the cases, proclaims to executors and trustees, that they have only to invest the trust money in the speculations, and expose it to the hazards of their own commerce, and be charged 5 per cent. on it; and then they may pocket 15 or 20 per cent. by a successful adventure. Surely the supposed difficulty of ascertaining the real gain made by the misapplication is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction.

1854
Barnes
v
Sutton

Even if cases were more likely to occur than I can think they are, of inextricable difficulties in pursuing such inquiries, I should still deem this the lesser evil by far, and be prepared to embrace it. Mr. Solicitor-General put a case of a very plausible aspect, with the view of deterring the Court from taking the course which all principle points out. He feigned the instance of an apothecary buying drugs with 100*l.* of trust money, and earning 1000*l.* a year by selling them to his patients;

X x 4

and

1864

Darby
v.
Sutton.

and so he might have taken the case of trust money laid out in purchasing a piece of steel or skein of silk, and these being worked up into goods of the finest fabric, *Birmingham* trinkets or *Brussels* lace, where the work exceeds by 10,000 times the material in value. But such instances, in truth, prove nothing; for they are cases not of profits upon stock, but of skilful labour very highly paid; and no reasonable person would ever dream of charging a trustee, whose skill thus bestowed had so enormously augmented the value of the capital, as if he had only obtained from it a profit; although the refinements of the civil law would certainly bear us out, even in charging all gains accruing upon those goods as in the nature of accretions belonging to the true owners of the chattels.

I have looked to the authorities with the view of seeing, generally, whether or not they afforded any direct precedent either way in this question; and, as far as decision goes, they certainly do not. But there are strong indications to be traced in the books of judges inclining towards the point which I would fain hope we may now be said to have reached. *Walker v. Woodward* (a) was referred to at the bar, as a case in which an executor having made profit by farming with his testator's stock, an account of the profits was waived, and 5 per cent. with rests charged. But there the testator's own concern was continued with his farm stock by the executor. A like remark arises upon *Heathcote v. Hulme* (b), although, as far as *dicta* go, Sir Thomas Plumer there certainly held a *cestui que trust* generally entitled to elect to take the profits made, or a rate of interest on the principal.

There

(a) 1 *Russ.* 107.

(b) 1 *J. & W.* 122.

There are other cases deserving of attention, as indicating the inclination of the Court on this subject. *Treves v. Townshend* (a) was the case of an assignee of a bankrupt who had kept near 2000*l.* for sixteen years, without ever proposing to make a dividend. It was on this circumstance mainly that the lords commissioners charged him with 5 per cent., and ordered him to pay the costs; but it further appeared, that he had employed the money in his trade as a *Blackwell Hall* factor, though he said he had an equal sum at his banker's ready to answer any demands—demands which, he was pretty well assured, would, through his own laches in discharging his duty of assignee, never be made. On a rehearing before Lord *Thurlow*, his Lordship said his only doubt was as to the rate of interest; but he held it established that the money had been used in the assignee's trade, and he said, "If 5 per cent. is made in that trade, I cannot give four." An inquiry was, therefore, offered to the Defendant as to the usual rate of a *Blackwell Hall* factor's profit; and this offer being refused, the decree of the lords commissioners was affirmed. If this case shews, on the one hand, the impression to have been that the Court would not go to the real amount of profits made, but only inquire as to these for the purpose of ascertaining whether more than the usual rate of 4 per cent. shall be allowed, limiting itself to the legal interest of 5 per cent., if so much has been made; it as clearly proves, on the other hand, that there was no disposition to shrink from an inquiry, now represented as impossible, into the rate of profits, and the proportion of them attributable to the trust fund. If, however, it were to be inferred from this case, that trust monies used in the trustee's trade cannot be charged with more than 4 per cent. unless more be made of them, the doctrine would be dangerous indeed.

Lord

(a) 1 *Bro. C. C.* 384. 1 *Cox*, 50.

1834.

Deeds.

v.

Seems.

1836.]

Deane v.

Sutton.

Lord *Loughborough* seems to have taken a far sounder view of the principles on which the Court deals with breach of trust, when he charged 5 per cent. simply on account of the unjustifiable use of the money, and without any regard to the gains made by the malversation. When Lord *Thurlow* stated that 4 per cent. was the rate usually allowed, and that it was never to be exceeded but in a special case, he laid down the admitted rule; but a special case was here abundantly made, when it was shewn that the assignee had allowed sixteen years to elapse without offering to make a dividend, and had, during that period, trafficked with the fund.

I have further to remark on this case, that the refusal of an inquiry by the Defendant who had appealed may seem to indicate an apprehension of more than 5 per cent. being charged, when the actual profits should be ascertained. It is possible, indeed, that he may have declined the inquiry for fear of being fixed with the additional costs. Sir *William Grant*, however, in *Rocke v. Hart* (a), referring to *Treves v. Townshend*, plainly considers that his refusal was for fear of more than 5 per cent. being found to be the profits of the business, and charged accordingly.

Pietz v. Stace (b), before Lord *Alvanley*, was the case of an executor not laying out the testator's money as he was directed, but employing it partly in his trade in stock transactions, and partly in loans to his son; and he was charged with 5 per cent. The doctrines of the Court are strongly and clearly laid down by Lord *Alvanley*. They are so well understood, said his Lordship, that it is waste of time to repeat them. An executor, acting otherwise than the testator desires with the property,

cannot

(a) 11 Ves. 58.

(b) 4 Ves. 620.

cannot possibly be a gainer by it: any gain "must be for the benefit of his *cestui que trust*; and if there is any loss upon the capital, as if the stocks rise ever so much, he must replace it. Every farthing more than the dividends that lay in his hands is just so much gain to himself; for every shilling he got by any of these transactions he shall pay interest at 5 per cent. for every minute it lay in his hands;" and accordingly the defendant was charged with the same interest on all he lent his son. Here, then, he was made to account not only for the actual profits made by the stock transactions, but for 5 per cent. on those profits. The principle stated, indeed, is as large as possible; for it comprehends all profits received by a trustee who deals with the trust-fund for his own advantage; but Lord *Alvanley* plainly had his mind directed to the kind of dealing in question; viz., in the stocks.

In *Pocock v. Reddington* (a), the same very able and accurate judge proceeds upon the like views. After observing that a trustee has no right to deal with the trust-fund so as to hazard it, on the chance of being able to replace it if lost, which, as his Honor with marked but not excessive severity says, is an argument used by others in a very different case, and which has cost them their lives, he says, "therefore the executor must answer for that which he may reasonably be supposed to have made; and if he made more, he must also answer for that too:" and the Defendant was ordered to be charged with the sum for which he had sold the stock, and with 5 per cent. upon it.

Lastly, I would refer to the case *Palmer v. Mitchell*, with a note of which I have been furnished, and which,

as

(a) 5 Ves. 794.

1894:
Docket:
v.
Sonne

1894.
 Decree
 or
 Summ.

as it was decided by Sir *William Grant*, deserves great attention as a precedent. *

It

ROLLA.
 1809.
 Dec. 8.

* The following is the note referred to: —

PALMER v. MITCHELL.

Executors charged with the profits made by them from the employment of the testator's assets in any trade or business since the testator's decease.

THIS was a suit for an account of the estates of the testator *William Innes*, deceased. The bill charged, that the Defendant, *George Hanbury Mitchell*, one of the executors, continued to carry on the business in which the testator had been engaged, and that he had retained large balances of the testator in his hands, which he had invested in that trade, or in other mercantile concerns or speculations.

Part of the prayer was, "That the Defendant, *George H. Mitchell*, may be charged with the profits and advantages which shall appear to have been made by him since the death of the testator, or from such time or times as the Court shall think reasonable, by means or in consequence of his having employed the testator's personal estate, or any part thereof, in carrying on his said trade or business, or in any other commercial or other concern."

The Defendant, *Mitchell*, by his answer, stated that he, after the decease of the testator, had opened new books of account, and carried on the trade on his own separate account, and with his own money, and with the assistance of his friends, until he entered into partnership with *James Cockburn*, since deceased; and after the decease of *J. Cockburn*, he entered into partnership with *Hugh J. Lindsay* and *Thomas Fleming*.

An account was decreed to be taken of what balances were from time to time in the hands of the executors, or either of them; and it was declared, that they ought to be charged with the profits and advantages made by them of the personal estate of the testator, whilst the same or any part thereof was employed by them in any trade or business since the testator's decease.

Reg. Lib. B. 1809. fol. 465.

CASES IN CHANCERY.

673.

It was right that I should advert to these authorities; at the same time I am ready to admit that my opinion in the present case is founded much more upon principle than upon decision. In affirming the decree of his Honor, I am sure that I over-rule nothing ever actually decided, and that I only extend an undeniable principle of the Court to a case where its application appears to be peculiarly called for by the most pressing considerations both of consistency in principle and expediency in practice.

1804,
Decided
in
Sauts

That the parties whose funds have been misapplied should, in every case, have their option of receiving either the actual profits made, or interest at 4 or 5 per cent. according to circumstances, appears a rule exposed to no serious objection; and although the Court, moved by special circumstances, may allow rests with compound interest, yet this seems, generally speaking, much less advisable than an account of actual profits.

Should in any case a serious difficulty arise in tracing and apportioning the profits, this may be a reason for preferring a fixed rate of interest in that case. Nor can any argument be raised upon the inconvenience of going into the special circumstances in each instance; for even according to the course pursued in the cases I have referred to, this kind of inquiry is indispensable. The authority of Lord *Thurlow* (who leant less hardly against trustees than any other judge) has laid it down that more than 4 per cent. is never to be charged without special circumstances proved; so that, at all events, some inquiry is rendered necessary; and this may be safely stated, that the last person who can be heard to argue from the difficulty of tracing or apportioning the profits of the misapplied fund, is the man whose breach
of

1854.

DOCKET

S.
SOUTH.

of trust has caused the misapplication and created the difficulty.

When did a court of justice, whether administered according to the rules of equity or of law, ever listen to a wrong-doer's argument to stay the arm of justice, grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather let me ask, when did any wrong-doer ever yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, you had better not make the attempt, for you will find I have made the search very troublesome? The answer is, "the Court will try."

The judgment must be affirmed; but, as this is a case of the first impression, without costs.

1888.
DOCKET
ROLLS
1888.
Nov. 25.

TREVOR v. TREVOR.

THOMAS Lord Hampden, under a settlement bearing date in the year 1768, was entitled for life to certain real estates, with remainder to his first and other sons in tail, with remainder to his brother John, who afterwards succeeded him as Lord Hampden, for life, with remainder to the first and other sons of John in tail, with other remainders which failed in the lifetime of Thomas Lord Hampden, and an ultimate limitation to the right heirs of Robert Lord Trevor, whose reversion in fee afterwards became vested in Thomas Lord Hampden. John, in the lifetime of his brother, redeemed the land tax on the settled estates, which was duly assigned to him under the Land Tax Act. Thomas Lord Hampden died without issue, and by his will devised his remainder in fee in the settled estates to his brother John, who succeeded him in his title, and became also tenant for life of the settled estates, with remainder to his first and other sons in tail. John Lord Hampden made his will on the 7th of September 1824, being then extremely ill, and thereby devised the settled estate on which he had purchased the land tax, and died two days afterwards. The question upon a petition presented by Robert Trevor, the executor of John Lord Hampden, was, whether the benefit of the land tax redeemed was to be considered as remaining personal estate of John Lord Hampden, or whether it belonged to John Lord Hampden's devisee.

A. being under a settlement tenant for life in remainder, after prior estates for life and in tail, with remainder to his own first and other sons in tail, with an ultimate remainder in fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estate during the life of the first tenant for life, and took an assignment to himself under the Land Tax Act. The prior tenant for life afterwards died without issue, having devised to A. the ultimate fee; and A. being in a dying state, and having no issue, made his will, and devised the fee of the settled estate,

Mr.

without declaring any intention with respect to the land tax redeemed. The land tax at his death continues to be part of his personal estate.

1893.

 PAVON
 &
 TREVOR.

Mr. Pemberton and Mr. Hope, for the petitioner, argued that the land tax, redeemed by John Lord Hampden when he was tenant for life in remainder of the estates in question, became, according to the provisions of the act of parliament (a), part of his personal estate, and must retain that character in the absence of any expressed intention on the part of Lord Hampden to the contrary. *Wigsell v. Wigsell* (b) was a case resembling the present; and stronger than the present in favour of the claim of the petitioner, inasmuch as, there, *Susannah Wigsell*, the person who paid off the charge, was tenant in tail in remainder, expectant upon the death of her brother and failure of his issue; and upon her becoming tenant in tail in possession, and afterwards dying without issue, it was held that the charge continued to subsist as part of her personal estate. The general rule was, that where a person, having an absolute interest in the estate, or such an interest as he was capable of rendering absolute, paid off a charge upon the estate, the charge ceased; but where a person, having only a partial interest in the estate, or an interest capable of being defeated, paid off a charge, the amount of the charge subsisted as part of his personal property, unless he manifested an intention that it should not do so. *Wyndham v. The Earl of Egremont* (c), *Drinkwater v. Combe* (d).

Mr. Barber, for the devisee, contended that the question as to the merger of the charge in the inheritance depended upon the intention of Lord Hampden, and that intention must be presumed in this Court according to the quantity of his estate at the date of his will. He was the tenant for life in possession, and had the

(a) 43 G. 3. c. 116. s. 123.

(c) *Amb.* 753.

(b) 2 *Sim. & Stu.* 364.

(d) 2 *Sim. & Stu.* 340.

the remainder in fee, subject only to the possibility of his having issue, he being at that time upwards of eighty years of age, and in a dying state. That possibility could not be taken into consideration in estimating the quantity of the testator's estate, for the purpose of determining the question whether the testator did or did not intend that the land tax should merge in the estate devised. The testator must, therefore, be considered in this Court, for the purpose of deciding the question of merger, as having been actually seised of an estate in fee. In *Astley v. Milles* (a), where this subject was much considered, the rule was recognised, that the question of merger must depend upon intention to be evidenced by the acts of the party; and it was there held, upon evidence of such intention, that a tenant for life, who had paid off charges upon the estate and afterwards purchased the reversion, and devised the estate subject to the charges, did not intend that the estate should pass *cum onere*.

1823.
TAYLOR
TAYLOR.

Mr. *Pemberton*, in reply, observed, that the law never supposed it to be impossible that a man should have issue, and that the remoteness of the possibility could never be considered in that Court as a ground for raising an inference of intention, in the absence of any other circumstance indicating the intention of a testator. *Astley v. Milles* did not affect the general presumption as to the intention of persons having a limited interest who paid off a charge; all that was decided in that case was that parol evidence was admissible to rebut the presumption.

The MASTER of the ROLLS.

When *John Lord Hampden* took the assignment of the land tax to himself, that act amounted to a declaration

(a) 1 *Am.* 298.

1822.

Taxv. Taxv.

tion of his intention that the land tax redeemed should be part of his personal estate. It could not afterwards sink into the real estate without his expressed intention to that effect, and there is no evidence of any such intention. It continues, therefore, to be part of his personal estate.

Rolls.
Nov. 20.
Dec. 5.

ELSTON v. WOOD.

The Court will not reform an entry on the court rolls, unless the lord be a party to the suit, or consent to such order as the Court shall think fit to make; but, the lord consenting to such order, the Court decreed that a surrender and admission on the court rolls, which gave an interest to the wife of a mortgagor in fraud of the mortgage, should be reformed.

The admissions in a joint answer by the husband and wife are no evidence against the wife, such joint answer being considered as the answer of the husband alone.

THE bill was filed by the Rev. *William Elston* and *William Brown*, executors of the will of *John Enefer*, against *Scarles Valentine Wood*, *John East Hamblin*, and *Sarah* his wife, and *Amos Orr*, an infant. In the month of *November* 1810, the Defendant *John East Hamblin* contracted with *Amos Orr*, the father of the infant Defendant, for the purchase of a certain copyhold estate held of the manor of *Woodbridge*, for the sum of 700*l.*; and being unable to pay the whole of the purchase money, he at the same time applied to the testator *John Enefer* for the loan of the sum of 400*l.* upon the security of the copyhold property, and that sum was accordingly advanced by the testator. On the 30th of *November* 1810, *Amos Orr* the vendor executed a bond to the Defendant *John East Hamblin*, in the penal sum of 800*l.*, conditioned for the quiet enjoyment and further assurance of the copyhold in question; and the bond recited that the said *Amos Orr* had, on the same day, surrendered the same copyhold into the hands of the lord of the manor, by his steward, to the use of the Defendant *John East Hamblin*, his heirs and assigns for ever.

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ever: On the same 30th of November 1810, the Defendant *John East Hamblin* executed a bond to the testator *John Enefer* in the like penal sum of 800*l.*, conditioned for the repayment to the testator of the sum of 400*l.*; and this bond contained a recital that the Defendant *John East Hamblin* and *Sarah* his wife had, on that day, made a conditional surrender of the copyhold, to the only proper use of the testator *John Enefer*, his heirs and assigns, as a security for the said sum of 400*l.* At the time of filing the bill, the steward of the manor was dead; and it appeared by an entry made in the steward's minute book, in his handwriting, bearing date the same 30th of November, that *Amos Orr* had on that day surrendered the copyhold to the use of the Defendant *John East Hamblin*, his heirs and assigns; but that such entry had been subsequently altered in the handwriting of the solicitor of the Defendant *John East Hamblin*, and by such alteration the surrender was stated to have been made to the use of the Defendant *John East Hamblin* and his wife, and the survivor of them, and the heirs of such survivor. The actual entry in the court rolls of the manor was according to such altered minute, and the Defendant *John East Hamblin* and his wife appeared to have been thereupon admitted.

The conditional surrender in the court rolls to the testator *John Enefer*, made by the Defendant *John East Hamblin* and his wife, upon her separate examination, was dated on the same 30th of November, and the testator was thereupon admitted.

By the custom of the manor of *Woodbridge*, the widow of a copyhold tenant was entitled to free-bench; but such free-bench was barrable by the act of the widow joining with her husband in the surrender of the copyhold.

1883.

Enfer

v.

Wood

1888.

Estate

of

Widd.

The bill charged that the altered entry in the minute book of the steward, and the actual entry on the court rolls to the use of the Defendant and his wife, and the survivor and the heirs of the survivor, was a fraud upon the testator *Ereger*; and prayed that such entry on the court rolls might be reformed, and converted into a surrender to the use of the Defendant *John East Hamblin*, and his heirs and assigns.

Upon the opening of the Plaintiff's case, the Master of the Rolls inquired whether the lord of the manor was a party to the suit; and it appearing that the lord was not a party, he stated that the cause could not proceed unless counsel were instructed to appear for the lord, and to consent to such order as the Court should think fit to direct, the lord being interested in the introduction of a new tenant upon the court roll.

Counsel were afterwards instructed to appear for the lord, and to consent to any order which should be made by the Court. The Defendant *John East Hamblin* and his wife put in a joint answer to the bill, and admitted many of the facts stated in the bill.

Mr. Tinney, for the Plaintiffs, relied upon the admissions in the joint answer of the husband and wife; and he cited *Brend v. Brend* (a) as an authority to shew that an erroneous entry on the court roll of a manor had been vacated by the Court, and reformed.

Mr. Bacon, for the husband and wife, said the wife, by her answer, claimed such interest as she might be entitled to; and he submitted to the Court how far her admissions

(a) *Finch*, 254.

CASES IN CHANCERY.

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admissions in the joint answer, which must be taken to be the answer of the husband, could be received as evidence to affect her interest.

Mr. Tinney contended that the Court would not allow the wife to take advantage of an interest given to her by the fraud of her husband.

The MASTER of the ROLLS held that such admissions could not be received against the wife; the joint answer of husband and wife being considered as the answer of the husband alone; but upon the whole evidence in the cause being read, his Honor declared, that the entry in the court rolls which gave the interest to his wife and to her heirs, if she survived, was a fraud upon the testator John Enser; and he decreed, that the entry upon the court rolls should be reformed according to the prayer of the bill, and that the wife could be entitled to no interest arising from the fraud of her husband.

Declare that the surrender to Hamilton and his wife, and the survivor of them, and the heirs of such survivor, was fraudulent as against the mortgage; and, the Lord consenting, let the surrender and admission be altered conformably to the actual agreement between Hamilton and the mortgagee.

1888

Rolls!

Dec. 17, 18.

HULME v. HULME.

Where by the terms of a settlement it appears to be the intention of the parties that there should at all times be two trustees of the property comprised in the settlement, the appointment of a single trustee in the place of two original trustees, and the transfer by them of the trust property to such single trustee, is a breach of trust, and the original trustees are responsible accordingly.

ON the 26th of July 1810, articles of settlement, in contemplation of an intended marriage between James Hulme and Ellen Docksey, were executed for conveying and assigning in trust to Thomas Stafford and John Braithwaite certain real estates, as soon as Ellen Docksey should attain the age of twenty-one, together with a sum of 500*l.* in money, to the use of the intended wife for life, remainder to the intended husband for life, remainder to the children of the marriage, with an ultimate limitation to the intended wife in fee. The marriage was shortly after solemnized. The wife attained her age of twenty-one in November 1813, when the articles were carried into execution by indentures of settlement, dated the 2d and 3d of November in that year. On the same 3d day of November an appointment, which was prepared by the same solicitor who prepared the settlement, was executed by the husband and wife, by which Powell, one of the Defendants, who was a private sailor, was named as a single trustee in the place of Stafford and Braithwaite, who were alleged to be desirous of being discharged from the trust; and the 500*l.* having been invested in the purchase of three per cent. consolidated annuities, the stock was transferred by Stafford and Braithwaite to the new-appointed single trustee, and by him immediately sold out and handed over to the husband, who shortly afterwards became bankrupt.

The bill was filed by the children of the marriage against the new trustee, and against Stafford, praying a retransfer of the stock which had been so transferred to the husband. Braithwaite, the other trustee, died

died insolvent, and his representatives were not made parties to the suit. It appeared, upon reference to the terms of the settlement, that it was the clear intention of the parties that there should in all times be two trustees of the property comprised in the settlement; and it was admitted by the counsel for the Defendant *Stafford* that this was the effect of the settlement.

Mr. Teed, for the Plaintiffs.

Mr. Wakefield, for the Defendant. Stafford.

Mr. Bickersteth, Mr. Pemberton, Mr. Tinney, Mr. Lowndes, and Mr. Cooke, for other parties.

The MASTER of the ROLLS.

The decree must be, according to the prayer of the bill, against the new trustee and the Defendant *Stafford*. The concurrence in the appointment of a single trustee, with the transfer of the stock by *Stafford* and *Braithwaite* to such single trustee, was a plain breach of trust on their part, and made them responsible for the stock so transferred. This being the case, it is unnecessary to direct those inquiries for the examination of the solicitor who prepared the settlement and new appointment of trustees, which would otherwise have been necessary in order to discover who were the parties and privies to the fraud thus committed.

~~1888~~
HULME
v.
~~HULME~~

1. The first step is to identify the problem. This involves understanding the current situation and the goals that need to be achieved.

1835.
T2411

1835.
ROLLS.
Feb. 28.
March 5.
April 16.

A testatrix directed several sums to be paid to certain Roman Catholic priests and chapels, desiring that they might be paid as soon as possible after her decease, that she might have the benefit of their prayers and masses; and she gave the residue of her property to trustees, upon trust, to pay 10*l.* each to the ministers of certain specified Roman Catholic chapels, for the benefit of their prayers for the repose of her soul, and that of her deceased husband, and to appropriate the remainder in such way as they might judge best calculated to promote the

knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of *Swale Dale* and *Wenston Dale*: Held, that the gifts to priests and chapels were void, and that the next of kin was entitled to the benefit of the failure, but that the gift of the residue was valid within the 2 & 3 W. 4. c. 115.

WEST v. SHUTTLEWORTH.

MARGARET TOWNSEND, by her will dated the 25th of January 1814, after giving certain pecuniary legacies, disposed of the residue of her property as follows:—“As to all the rest of my estates and effects, I give and bequeath the same to Sir *Henry Lawson* of *Brough*, in the county of *York* Bart., and *Simon Serroape* of *Danby* in the same county, Esq., their executors and administrators; and I appoint *John Carr* of *Belle Vue* *Sheffield*, Mr. *John Shuttleworth* of *Cannan Hall* near *Sheffield*, and Mr. *John Furniss* of *Sheffield*, joint executors of this my will; and hereby revoking all former wills by me made, I declare this only to be my last will and testament. In witness whereof, I have hereunto set my hand and seal, this 20th day of January 1814.—
Margaret Townsend.”

On the same day she wrote and signed the following testamentary paper:—“Omitted in my will, chapels and priests. To the chapel of *St. George's Fields, London Road*, 10*l.*; *St. Patrick's* chapel, *Sutton Street*, 10*l.*; *Lichfield* chapel, 10*l.*; the Reverend *Rowland Broomhead*, *Manchester*, 5*l.*; the Reverend Mr. *Gabb*, *Work-sop*, 1*l.* 1*s.*; the Reverend Mr. *Duchern*, 1*l.* 1*s.*; the Right Reverend Mr. *Smith*, *Durham*, 1*l.* 1*s.*; the Reverend *Joseph Tristram*, 1*l.* 1*s.*; the Reverend *John Tristram*, 1*l.* 1*s.* Whatever I have left to priests or

chapels,

1885.

 WEST,
 S.,
 SHUTTLE-
 WORTH,

ginal hearing of the cause. The bill was filed by *Anne West*, the residuary legatee and personal representative of the sole next of kin of the testatrix, against the surviving executor, the representatives of the trustees, and the Attorney-General. The bill charged that the unadministered personal estate of the testatrix, in the hands of the executors, arose from monies due upon real securities to the testatrix at the time of her decease, and the Plaintiff claimed to be entitled thereto by virtue of the statute of 9 G. 2. c. 36.

At the hearing of the cause it was, among other things, referred to the Master to inquire what proportion of the residue of the testator's personal estate consisted of pure personalty, and what proportion of personal estate arising from mortgages, or otherwise connected with realty; and the Master by his report found, that out of 291*l.* 16*s.* 7*d.* 3 per cent. consols, the residue of the testator's general personal estate, the sum of 2479*l.* 13*s.* like annuities, arose from personal estate connected with realty, and that the remaining sum of 434*l.* 3*s.* 7*d.* 3 per cent. consols arose from pure personal estate.

Mr. *Bickersteth* and Mr. *Bethell*, for the Plaintiff.

If the legacies given by this testatrix are void, and there is, moreover, no indication of any charitable purpose on the part of the testatrix, they will fail altogether, and the next of kin will be entitled to the benefit of the failure. The gifts to priests and chapels for the purpose of obtaining prayers and masses for the repose of the soul of the testatrix, and the soul of her deceased husband, are gifts to a superstitious use, and consequently void, either by virtue of the statute of 1 *Edw.* 6. c. 14.; or, if not falling within the superstitious uses expressly mentioned in the statute, void as against the policy of the

the

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the law. There is no purpose of charity indicated by these gifts; no benefit was intended to be conferred by the testatrix upon the priests; her own benefit, and that of her deceased husband, were the only objects which she contemplated; and as the law will not give effect to a superstitious use, the next of kin are as much entitled to the benefit of the failure as if she had expressly devoted a part of her real estate to a charitable purpose. The gift of the residue to be applied in such manner as may best promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of *Swale Dale* and *Wenston Dale*, being a gift for the purpose of propagating a religion other than that of the state, is equally void, as contrary to the policy of the law: *Cary v. Abbot* (a), *De Costa v. De Paz* (b), *Moggridge v. Thackwell* (c), *De Bouteval v. De Thaminnes* (d), *Attorney-General v. Power*. (e)

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Mr. *Lynch* and Mr. *Purvis*, for the personal representative of Sir *H. Lawson*.

The gifts to chapels and priests, for the benefit of the prayers and masses which the testatrix desired to be said for the repose of her soul, are in the nature of rewards for services to be performed, and there is no ground for supposing that the testatrix desired such prayers and masses to be said in perpetuity; on the contrary, the small amount of the sums given, and the direction for the immediate payment of those sums, are inconsistent with that supposition. The trust, therefore, so far as it respects those gifts, is neither void by the statute of superstitious uses, as it is called (g),

nor

(a) 7 Ves. 490.

(b) Amb. 228. 2 Swans. 487. n.

(c) 7 Ves. 38.

(d) 5 Russ. 288.

(e) 1 Ball. & Beatt. 145.

(g) 1 Edw. 6. c. 14.



nor by reason of its being contrary to the policy of the law. There is, in fact, no statute, as has been observed by Sir William Grant, making superstitious uses void generally, the statute of *Edw. 6.* relating only to superstitious uses of a particular description then existing: *Mary v. Abbot.* (a) And even if the gift could be shewn to fall within the class of uses declared or recognised by the statute of *Edw. 6.* as superstitious, that statute would have no application, as the contest here is only for personal estate; and the fifth and sixth sections of the statute, which vest in the Crown gifts for the maintenance of obits and other like things, apply only to real estate.

With respect to the gift of the residue, which is to be appropriated in such way as the trustees may judge best calculated to promote the knowledge of the Catholic Christian religion among the poor inhabitants of the particular districts mentioned, that might have been held to be void, as contrary to the policy of the law previously to the passing of the late acts for the relief of his Majesty's Roman Catholic subjects, but it is now a perfectly valid bequest. By the 31 G. 3. c. 32. relief was afforded, upon certain conditions, against the severe enactments relating to Popish recusants passed in the reigns of *Elizabeth* and *James*; but that act, nevertheless, contained a provision (b), that all dispositions of property before deemed to be superstitious or unlawful should continue so; and it was upon that ground, that in *Mary v. Abbot* (c), Sir William Grant held a bequest for the purpose of educating and bringing up poor children in the Roman Catholic faith to be void, as contrary to the policy of the law. Whether that decision

(a) 7 Ves. 496.

(b) s. 17.

(c) 7 Ves. 490.

was or was not founded upon too narrow a view of the remedial purpose and effect of the Statute. It is now unnecessary to consider; for the interests of his present Majesty has put beyond all question the validity of bequests, the object of which is to promote the education of Roman Catholics, and their instruction in the tenets of the Roman Catholic religion. The Catholic Relief Act (10 G. 4. c. 7.) left it still open to some doubt how far his Majesty's Roman Catholic subjects were relieved from disabilities in respect of their right of holding property given for the purposes of education and religious instruction; and that doubt was removed by the 2 & 3 W. 4. c. 115., which places Roman Catholics upon exactly the same footing as Protestant dissenters, in respect to their schools, places for religious worship, education, and charitable purposes in Great Britain, and the property held therewith, and the persons employed in and about the same. That act has been held by Lord Brougham, in the recent case of *Bradshaw v. Tasker* (a), to be retrospective; and such being the state of the law, the only question now is, whether such a trust as is raised by this testatrix in behalf of Roman Catholics, and for the purpose of giving instruction in the tenets of the Roman Catholic religion, would be a valid trust if raised in behalf of Protestant dissenters, and with a view to religious instruction in the particular doctrines held by Protestant dissenters, or any class of them. Whatever the law may be as applied to Protestant dissenters in respect of their education and religious worship, such is now the law to be applied to Roman Catholics. In the *Attorney-General v. Pearson*, Lord Eldon says, "It is clearly settled that, if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that

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S.
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WORTH.

(a) p. 221. *supra*.

1835.

Watt
v.
Shuttleworth.

of maintaining a society of Protestant dissenters, promoting no doctrines contrary to law, although such as may be at variance with the doctrines of the established religion, it is then the duty of this Court to carry such a trust as that into execution." (a) Now the doctrines of the Roman Catholic church, although at variance with the doctrines of the established church, are no more contrary to law than the doctrines of any class of Protestant dissenters; they are now placed by law on precisely the same footing; and, if a bequest for promoting instruction in the one be valid, such a bequest must be equally valid with respect to the other.

Mr. Wray, for the Attorney-General, disclaimed any disposition to narrow the construction to be fairly put upon the 2 & 3 W. 4. c. 115.; but he submitted that, looking to the preamble of that act, and to its object, which was to remove doubts as to the right of Roman Catholics to acquire and hold property necessary for religious worship, education, and charitable purposes, it could never have been the intention of the legislature, in carrying into effect that limited purpose, to change the whole policy of the law as it applied to doctrines other than those of the established church, and to sanction the unlimited propagation of the Roman Catholic religion. A gift for the purpose of propagating the Jewish or any other religion contrary to that of the established church was illegal; but such a gift indicated a charitable purpose, which the Crown was entitled to carry into effect by applying the bequest, under the sign manual, to some lawful object: *De Costa v. De Paz*. (b)

Mr. Parker, for the surviving executors.

Mr.

(a) 3 Mer. 409.

(b) Amb. 228. 2 Swanst. 487. n.

Mr. *Bickersteth*, in reply.

The gifts to the ministers of the Catholic chapels for the purpose of obtaining prayers and masses for the repose of the testatrix's soul cannot be considered as gifts for the performance of a temporary service; for it was clearly the intention of the testatrix that such prayers and masses should be continued for an indefinite period, or at any rate for as long a period as her soul might continue in purgatory. It is obvious that no personal benefit was intended to the ministers; it is a gift for a purpose in its nature superstitious, and void, therefore, as contrary to the policy of the law, independently of the statute of *Edw. 6.*

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&
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With respect to the gift of the residue, it is not disputed that by the Catholic Christian religion, the knowledge of which is to be promoted among the poor and ignorant inhabitants of *Swale Dale* and *Wenston Dale*, the testatrix meant the Roman Catholic religion. "To promote the knowledge of the Roman Catholic religion" might mean to promote the knowledge of the errors of that religion, and thereby to confirm and establish in a purer faith the persons among whom such knowledge was disseminated; and, if that construction could be put upon the words, the bequest might well be carried into effect by instructing the poor and ignorant inhabitants of *Swale Dale* and *Wenston Dale* in the Protestant religion. But this was manifestly not the object of a testatrix professing the Roman Catholic religion, and it cannot be denied that her object was to induce persons who previously did not believe in the Roman Catholic religion to become converts to it—to make proselytes—and to promote the spread of the Roman Catholic religion at the expense of congregations professing other modes of belief. If, then, it was the intention of the testatrix

to

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to make proselytes, this is a trust which cannot be carried into execution by this Court; for if it were capable of being so carried into execution, what would be the consequence? The Court must refer it to the Master to approve of a scheme whereby the Roman Catholic religion may be promoted in the most effectual manner. It is perfectly clear that the legislature, in passing the late act, could never have intended to sanction such a consequence as this. It is said that the 2 & 3 W. 4. c. 115. is declaratory of the intentions of the legislature, which were not, in this respect, declared with sufficient explicitness in the Catholic Relief Act, and that the act of W. 4. places Roman Catholics and Protestant dissenters exactly upon the same footing in respect of their schools and places of religious worship, education, and charitable purposes. No one who rightly appreciates the late salutary enactments for the relief of his Majesty's Roman Catholic subjects can desire to narrow their just construction; but it should be borne in mind that by the late act Roman Catholics are to be "subject to the same laws as the Protestant dissenters are subject to in *England* in respect to their schools and places for religious worship, education, and charitable purposes, and *not further or otherwise.*" If, therefore, this testatrix had left her property for the benefit of persons professing the Roman Catholic religion, or if she had left it for the purpose of maintaining a Roman Catholic church or school, such a bequest would have been a good charitable legacy. But it is a totally different thing to leave a provision for the purpose of making proselytes; and such a bequest would be equally unlawful whether the religion to which proselytes were sought to be made were the Roman Catholic, the Jewish, the Presbyterian, or any other religion different from that of the established church. All the authorities support this view of the subject.

In

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In *De Costa v. De Paz* (a), Lord Hardwicke decided that a bequest for the maintenance of a *Jesiba* or assembly for daily reading the Jewish law, and for advancing or propagating the Jewish religion, was unlawful, "the intent of the bequest being in contradiction to the Christian religion, which is a part of the law of the land, which is so laid down by Lord Hale and Lord Raymond; and undoubtedly is so, for the constitution and policy of this nation is founded thereon." Lord Hardwicke at first doubted whether the next of kin were not entitled to the void bequest, but he afterwards decided that the donation was a charitable use, and that the power of appointing to what lawful charitable purpose the bequest should be applied devolved upon the crown. It is to be observed, however, that Lord Eldon in commenting upon this case in *Moggridge v. Thackwell*, does not concur with Lord Hardwicke in considering the bequest a charitable use; for he says, he should not have discovered that it was a charitable bequest in the intention of the testator. (b) No one can doubt that the same principle would be equally applicable to a trust for promoting and propagating the particular doctrines of Unitarian dissenters, or of the Presbyterian church, or any mode of religious belief or worship differing from the established religion, because, if such a trust could be executed and administered by this Court, it would follow that the Court must direct the Master to approve of a scheme for promoting the spread of Unitarian or Presbyterian doctrines, or whatever mode of religious belief it might be the object of the trust to advance and propagate. The bequest then being for a purpose which is contrary to the policy of the law, and no charitable purpose being indicated, fails altogether,

(a) *Ambl.* 228.; and see 2 *Swans.* 487., where a more accurate report of that case is given from Mr. Coxe's MSS.

(b) 7 *Ves.* 81.

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 WORTH.
 April 16.

altogether, and the next of kin will be entitled to the residuary estate of the testatrix.

*The MASTER of the ROLLS.**

The testatrix in this case, after giving several legacies, some of which were for charitable purposes, as to the residue of her estate and effects, bequeathed the same to Sir *Henry Lawson* and *Simon Scroop*, and she appointed *John Carr*, *John Shuttleworth*, and *John Furnis* her executors. There is then a paper entitled "Omitted in my will, chapels and priests. To the chapel of *St. George's Fields, London Road*, 10*l.*; to *St. Patrick's chapel Sutton Street*, 10*l.*; to *Litchfield chapel* 10*l.*" Several small legacies are then enumerated to several clergymen by name, and then comes this note: "Whatever I have left to priests and chapels it is my wish and desire the sums may be paid as soon as possible, that I may have the benefit of their prayers and masses." There is then a letter signed by the testatrix and addressed to Sir *John Lawson* and *Simon Scroop*, which has been proved as testamentary, as follows:—"Gentlemen, I have herewith sent a duplicate of my will, whereby you will perceive that I have taken the liberty of bequeathing the residue of my property to you, in confidence that you will appropriate the same in the manner most consonant to my wishes, which are as follows:—that the sum of 10*l.* each be given to the ministers of the Roman Catholic Chapels of *Greenwich*, *St. George's in the Fields*, *Sutton Street*, *Soho Square*, and *York*, for the benefit of their prayers for the repose of my soul, and that of my deceased husband *George Townsend*, and that the remainder be appropriated by you in such way as you may judge best calculated to promote

* Sir C. Pepys.

promote the knowledge of the Catholic Christian religion amongst the poor and ignorant inhabitants of *Swale Dale* and *Wenston Dale*, in the county of *York*."

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These legacies are objected to upon two grounds: first, as to the legacies to the priests and chapels, upon the ground that they are for superstitious uses, and therefore void; and secondly, as to the residue, because it is given for the express purpose of promoting the Roman Catholic religion.

I shall first consider the objection to the gift of the residue. The stat. 2 & 3 W. 4. c. 115. puts persons professing the Roman Catholic religion upon the same footing with respect to their schools, places for religious worship, education, and charitable purposes, as Protestant dissenters; and the case of *Bradshaw v. Tasker* (a) decided that the act was retrospective, and that the third section did not exclude the legacies in question in the cause from the operation of the act, because the suit was only for the administration of the estate. In the present case, the bill filed by the next of kin claimed the property, as inapplicable, under the statute of mortmain, to any charities, and not because it was given to promote the Catholic religion, or to give instruction to those who profess it; and the letter which raises the question as to the residue was not proved until the 15th of *January* 1834, so that it cannot be said that the property in question was in litigation, discussion, or dispute upon the point now contended for at the time the act passed in 1832.

This act makes it unnecessary to consider what was the state of the law, before it passed, with respect to such dis-

(a) p. 221. *supra*.

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dispositions of property in favour of Roman Catholics. It is only necessary to inquire what is now the state of the law with respect to similar dispositions of property in favour of Protestant dissenters. The trust is to appropriate the residue in such way as the trustees shall judge best calculated to promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of certain places named. In the case of *Bradshaw v. Tasker*, the gift was in favour of certain Catholic schools, and to be applied towards carrying on the good designs of the said schools. Now, can it be said that to promote the carrying on the good designs of Catholic schools differs in principle from promoting the knowledge of the Catholic Christian religion amongst the poor and ignorant? In *Attorney-General v. Pearson*, Lord Eldon says, that the Court will administer a fund given to maintain a society of Protestant dissenters promoting no doctrine contrary to law, although such as may be at variance with the doctrine of the established church. (a) In *Attorney-General v. Hickman* (b), a legacy was established, which was given for encouraging such nonconforming preachers as preach God's word in places where the people are not able to allow them a sufficient and suitable maintenance, and for encouraging the bringing up some to the work of the ministry who are designed to labour in God's vineyard among the dissenters, leaving the particular mode to the trustees. *Waller v. Childs* (c), and the cases which continually occur of funds left to support the chapels and schools of dissenters, proceed upon the same principle, and leave no doubt in my mind of the validity in law of the gift of the residue.

The

(a) 5 Mer. 409.

(b) 2 Eq. Abr. 193.

(c) Amb. 524.

The gifts to priests and chapels remain to be considered, and these are not affected by the 2 & 3 W. 4. c. 115., which applies only to schools, places for religious worship, education, and charitable purposes. Taking the first gift to priests and chapels in connection with the letter, there can be no doubt that the sums given to the priests and chapels were not intended for the benefit of the priests personally, or for the support of the chapels for general purposes, but that they were given, as expressed in the letter, for the benefit of their prayers for the repose of the testatrix's soul and that of her deceased husband; and the question is, whether such legacies can be supported. It is truly observed by Sir *William Grant* in *Cary v. Abbot* (a), that there was no statute making superstitious uses void generally, and that the statute of *Edw. 6.* related only to superstitious uses of a particular description then existing; and it is to be observed that that statute does not declare any such gift to be unlawful, but avoids certain superstitious gifts previously created. The legacies in question, therefore, are not within the terms of the statute of *Edw. 6.*, but that statute has been considered as establishing the illegality of certain gifts, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in *Duke* (b), been decided to be within the superstitious uses intended to be suppressed by that statute. I am therefore of opinion that these legacies to priests and chapels are void.

What then is to become of the amount of such legacies? The statute of *Edw. 6.* gives to the King such property devoted to superstitious uses as that act affects; but the legacies in question are not within the

terms

(a) 7 Ves. 490.

(b) p. 466.

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terms of the act, but are void on account of the general illegality of the object they were intended to answer. It has been decided, that where legacies are given to charities, which charities cannot take effect, the object being considered as superstitious, then the duty of appropriating the amount to other charitable purposes devolves upon the Crown as in *Cary v. Abbot* (a); but in that case and the cases there cited, the object of the gift was clearly charity. In the present case, according to the construction I have put upon these legacies, there was nothing of charity in their object; the intention was not to benefit the priests, or to support the chapels, but to secure a supposed benefit to the testatrix herself. Upon what ground, then, can the Crown claim? Not by virtue of 1 *Edw. 6.*, for the case is not within that act; and not upon the ground of the money given being devoted to charity, the mode of applying which devolves upon the Crown. Doubts have been entertained how far it was correct to give to the Crown for the purpose, of being applied to charity funds given for charitable purposes which are illegal, as in the case of *Corbyn v. French* (b), and in *De Garcin v. Lawson*, in the note to that case; but in all such cases charity was the object of the gift; and how can the claim of the Crown attach to gifts void because superstitious, but of which charity was no part of the object? These gifts are void because illegal; and as they therefore cannot take effect, and as the Crown cannot claim either under 1 *Edw. 6.*, or upon the authorities which give to the Crown the right to direct the application of charity legacies, which cannot be carried into effect according to the directions of the donor, I am of opinion that the next of kin are entitled.

(a) 7 *Ves.* 490.

(b) 4 *Ves.* 418.

1833.

ALCOCK v. SLOPER.

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1833.
Dec. 18.

THE residuary clause in the will of *Richard Hudson* was as follows:—“All the rest, residue, and remainder of my estate and effects, whether real or personal, I devise and bequeath unto my executors hereinafter named, upon trust to permit my wife, *Catherine Hudson*, to receive the rents, profits, dividends, and annual proceeds thereof, to and for her own sole use and benefit, during her life; her own receipt to be a sufficient and proper discharge for the rents and dividends to be received by her; and from and immediately after her decease, then upon trust to sell my freehold house in *Oxford Street*, and also my leasehold houses, by auction; and it is my desire that Mr. *Edward Abbott* be employed as auctioneer, to convert the whole of my estate and effects into money, and to distribute the same in equal shares and proportions,” in the manner mentioned in the will. The testator appointed his wife *Catherine Hudson*, and *Ralph Lonsdale*, executors of his will.

When a testator limits his residuary property to one for life, with remainders over, it is *primâ facie* to be intended that the testator means that the property which is given to the tenant for life is to pass to those entitled in remainder; and if any part of the property be of a wasting nature, as long annuities, or leasehold, it must be immediately sold and converted into permanent property, unless, upon the whole context of the will, it shall appear that the testator had not that intention.

Part of the residuary estate of the testator consisted of a sum in long annuities. The bill was filed by legatees entitled in remainder, against the testator's widow, *Ralph Lonsdale*, and other parties interested under the will, and the question in the cause was, whether the widow of the testator was to be permitted to enjoy the income of the long annuities during her life, or whether the long

annuities Where the testator gave

the residue of his estate, real and personal, to his executors upon trust, to permit his wife to receive the rents, profits, and annual proceeds thereof to her sole use during her life, and after her decease upon trust to sell his freehold house in *Oxford Street*, and also his leasehold houses, by auction; and the testator desired that *E. A.* should be employed as auctioneer, to convert the whole of his estate into money for the purposes therein mentioned; it was held, that the widow was entitled to enjoy for her life the income of the testator's long annuities.

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ALCOCK
P.
SLOPER.

annuities were to be immediately sold and the produce invested in the 3 per cent. consols, and the widow to enjoy only the dividends of the consols so purchased.

Mr. *Bickersteth* and Mr. *Thompson*, for the Plaintiffs.

The general rule is, that where personal property of a wasting nature is bequeathed for life with remainders over, and not specifically, it is to be immediately converted into the 3 per cents. This rule is applicable in all cases where the testator directs perishable or wasting property to be enjoyed by persons in succession, unless it can be collected from the will that the testator intended such property to continue in *specie*. If no such intention is to be collected, the Court understands that the property is to be put into such a state that the persons in remainder shall enjoy it after the decease of the first taker; *Howe v. The Earl of Dartmouth*. (a) In this will there is nothing to distinguish the long annuities from any other personal property of the testator which was of a wasting nature. The leasehold property is expressly directly to be sold after the death of his wife; but there is no such direction as to his long annuities; and the direction to convert into money the whole of his estate and effects after the death of his wife, must be referred, according to the natural construction of the words, to the property of which the testator had been speaking in that part of his will, namely, his freehold and leasehold estates.

Mr. *Whitmarsh*, for Defendants in the same interest with the Plaintiffs.

Mr. *Pemberton* and Mr. *Chandless*, *contra*.

The rule laid down in *Howe v. The Earl of Dartmouth* is no doubt applicable where the testator is wholly
silent

(a) 7 Ves. 137.

silent as to the conversion or non-conversion of property in its nature perishable; and the question in every case must be, whether the immediate conversion of such property is or is not consistent with the intentions of the testator to be collected from the whole will. In this case the testator had no stock except the long annuities in question; and it is evident, therefore, that he must have had that stock in his contemplation when, in disposing of the residue of his estate, he directed the rents, profits, *dividends*, and annual proceeds thereof to be paid to his wife during her life. The testator has expressly pointed out the time at which his leasehold property, which was equally of a wasting nature with the long annuities, was to be sold. His freehold property was to be sold at the same time, and a particular auctioneer was to be employed to convert the *whole* of his estate and effects into money. At what time was this conversion to take place? At the death of his wife. Then, and not till then, were the long annuities to be sold. In *Collins v. Collins* (a), a case recently before the Court, where a testator left all his property to his wife for her life, and directed it to be divided into moieties at her decease, one half among the persons mentioned in his will, and the other half to be at the sole disposal of his wife, it was held that the persons in remainder were not entitled to have the testator's leasehold property sold.

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 ALCOCK
 v.
 SLOPER.

The MASTER of the ROLLS.

In the case of *Howe v. The Earl of Dartmouth*, some confusion arises from the use of the term specific legacy in the judgment, general personal estate being at all times fluctuating; until the death of a testator there can be no specific legacy of general personal estate. The true principle upon which Lord *Eldon* decided that case was this,—that where a testator limits his residuary property

(a) The next case.

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v.
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perty to one for life, with remainder over, it is *primâ facie* to be intended that the testator means that the same property which is given to the tenant for life should go to those entitled in remainder; and if any part of the residue be of a wasting nature, as long annuities, or leasehold estate, in order to effect this general purpose of the testator, such wasting property must be sold and converted into permanent property. Although this intention of the testator is *primâ facie* to be inferred, it may plainly appear upon the whole context of the will that the testator had not that meaning, but that his intention was that the tenant for life should derive the same income from the residuary estate as he had himself derived from his property up to the period of his death.

It is with a view to this principle that the present will is to be examined. The testator gives the residuary estate to trustees, "upon trust to permit his wife to receive the rents, profits, dividends, and annual proceeds thereof, to and for her own sole use and benefit, during her life." There is here no intimation of an intention that any part of the property should be immediately converted by the trustees; but the inference rather is, that the trustees during the life of the wife were to be merely passive; and the term "dividends" has reference to the long annuities. After the death of his wife, he directs his trustees to sell his freehold house in *Oxford Street*, and also his leasehold houses, by auction. The leasehold houses, like the long annuities, were a wasting property; and he has plainly expressed his intention that they should not be sold during the life of his wife; and this is manifestly inconsistent with the general notion on his part that the wasting portion of his residuary estate was immediately to be converted into permanent property. The next passage in his will is to the same effect:—
"And it is my desire that Mr. *E. Abbott* be employed, as auctioneer, to convert the whole of my estate and effects

effects into money, and to distribute the same in equal shares and proportions," &c. The testator could not have meant that Mr. *Abbott* should convert the whole of his property after the death of his wife, if he had intended that any part of it should be converted during the life of his wife. The widow is therefore entitled to enjoy for her life the income of the long annuities.

1839.

ALCOCK
v.
SLOPER.

COLLINS v. COLLINS.

ROLLS.
July 6.

THE will of *Thomas Collins* was in the following words:— "I give to my wife *Sarah Collins* all and every part of my property in every shape, and without any reserve, and in whatever manner it is situated, for her natural life; and at her death, the property so left to be divided in the following manner:—one half in equal proportions to my father, *John Collins*, to my brothers, *Richard Collins*, *George Collins*, *Charles Collins*, and my sister, *Mary Drew*; and, in the event of my father dying before my wife, his share to go to my mother, *Mary Collins*; and in the event of their both dying before my wife, their share to be equally divided between my brothers and sister named above; and in the the event of my brothers *George* or *Charles* dying before my wife without lawful issue, their shares to be divided between my brother *Richard* and sister *Mary* above mentioned; the other half of the property to be at the sole disposal of my dear wife; and I appoint my brother, *Richard Collins*, and my wife, *Sarah Collins*, my executors."

A testator gave to his wife all and every part of his property, in every shape, and without any reserve, for her life; and at her death the property so left to be divided, one half among certain persons mentioned, the other half to be at the sole disposal of his wife. Part of the testator's property was leasehold: Held, that the persons to whom a moiety of the testator's property was given over were not entitled to have the leasehold property sold, but that the widow was entitled to enjoy it for her life.

The testator died leaving his wife, *Sarah Collins*, his father and mother, and the brothers and sister mentioned

widow was entitled to enjoy it for her life.

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 v.
 COLLINS.

tioned in his will, surviving him. The widow and *Richard Collins* proved the will; but *Richard Collins* took no part in the execution of the trusts thereof. The bill was filed against the executors for the administration of the testator's estate, by *John Collins* and *Mary* his wife, the testator's father and mother, and by the other brothers and sister. A part of the testator's property consisted of a leasehold messuage in which he had carried on the business of a victualler, and in which his widow had since his decease continued to carry on the business, as the Plaintiffs alleged, and the Defendant, *Richard Collins*, admitted, at a great loss; and the question was, whether the Plaintiffs, and the Defendant, *Richard Collins*, who was in the same interest with the Plaintiffs, were entitled to have the lease, of which twenty-eight years were unexpired, immediately converted into money.

On the one side it was argued, that the rule laid down in *Howe v. The Earl of Dartmouth* (a), as to the duty of executors to convert property of a wasting nature into money, was especially applicable to the present case, as there was not only no indication in the will that the testator intended the leasehold property to remain *in specie*, but the gift of a moiety of that property to the Plaintiffs, and to the Defendant, *Richard Collins*, after the decease of the widow, was wholly inconsistent with such an intention. The immediate conversion of the property was as necessary to ascertain the moiety to which the widow was absolutely entitled, as it was to secure to the persons entitled in remainder their interest in the other moiety. The widow was little more than forty years of age, and might well exhaust the whole residue of the term, if the lease were not sold, and a moiety of the produce of sale invested, so as to secure both to the tenant for life and

to

(a) 7 Ves. 137.

to the remainder-men the benefit intended to be given to them respectively by the testator.

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COLLINS
v.
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On the other side it was contended, that the testator's direction that the property given to his wife for her life should be divided at her death plainly indicated an intention that no conversion of it should take place until the decease of his wife. The division was to be, not of a moiety of the property, but of the whole property previously given to the wife for life into moieties; and the direction that one half of the property, so to be divided at her decease, was to be at her sole disposal, was equivalent to an immediate gift of the absolute interest in one moiety of the property. The whole property of the testator was given to his widow for her life, "without any reserve;" and where the intention to favour the tenant for life was so strongly indicated, the possibility of such part of the property as was of a wasting nature being exhausted in the lifetime of the tenant for life, raised no equity in favour of the remainder-man; but the gift to the remainder-man must be taken to be subject to such possibility.

Mr. Pemberton and Mr. Hall, for the Plaintiffs.

Mr. Bickersteth and Mr. B. Keen, for the Defendant, Richard Collins.

Mr. Barber, for the widow.

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I am of opinion that, under this bequest, the Plaintiffs are not entitled to have the lease sold, but that it was the intention of the testator that his widow should enjoy the leasehold property for her life.

1833.

1853.
 March 20, 21.
 26.
 April 15.
 July 2.
 1854.
 Feb. 13, 21, 22.
 March 4.

The provision in the General Inclosure Act, that the commissioners' oath, and the appointment of any new commissioner, shall be annexed to and enrolled with the award, is merely directory.

An inclosure act, reciting that *S.* was entitled, as lord of a manor, to the soil and royalties, and, as lay rector, to all tithes within the manor, and that he claimed right of common on the waste

in respect of the soil and royalties, directed certain allotments to be made to him in compensation for his right to the soil of the waste, and to the tithes, and that the residue of the waste should be divided among *S.* and the other persons having right of common upon such waste, in proportion to their respective claims; and it reserved to the lord the seignory and royalties. The act made no mention of any right of warren existing in the lord; but there was some evidence that *S.* had used part of the waste as a rabbit-warren. The award gave an allotment to *S.* for his right of warren, and also three other allotments, which purported to be made for his right to the soil, his right to the tithes, and his right of common and other rights and interests in the waste, respectively; which allotments were declared to be a full compensation for all his right and interest in the lands directed to be inclosed: Held, that *S.*'s title to the warren allotment was not such as a purchaser could be compelled to take.

CASAMAJOR v. STRODE.

UNDER the decree in this cause, certain real estates situate at *Northaw*, formerly the property of *William Strode*, deceased, were put up to sale in lots in the month of *October* 1811, when *W. W. Drake* became the purchaser of lots 25 and 30. An abstract of title was delivered soon afterwards; but various difficulties were raised with respect to the title, and after a great deal of negotiation between the solicitors of the parties, the usual reference was made on the 16th of *November* 1815, directing an inquiry upon that subject. On behalf of the purchaser, objections were carried in to the Master's office, some of which were removed or abandoned, and others persisted in; eventually the Master overruled them all, and, on the 23d of *June* 1831, reported that a good title could be made to both lots.

The purchaser took a general exception to the report, grounded on the following, among other, objections:—

“ First,— Because it is alleged that the title to part of the said premises is derived under an award made by the

the commissioners under an act of parliament passed in 43 G. 3., for dividing, allotting, and inclosing, and otherwise improving the waste land within the parish of *Northaw*; and it has not been shewn that the persons by whom such award was made had qualified themselves to carry the said act of parliament into execution; nor that Mr. *John Taylor*, one of such persons, had been duly appointed a commissioner for the purposes of the said act, or had power to make such award.

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CARAMAJOB
v.
STRODE.

Secondly, — Because it alleged that the premises in question are part of the allotments made by the said award to Mr. *Strode*, in respect of his right to tithes and to the warren.

Thirdly, — Because no title has been shewn to the warren in respect of which such allotment was made, and that no evidence has been given to prove that the warren was tithe free.”

The Vice-Chancellor, before whom the exception was originally argued, overruled the several grounds taken in support of it. The purchaser thereupon appealed.

The argument before his Honor, as well as in the Court above, turned entirely on the construction and effect to be given to the General Inclosure Act, and the *Northaw* Inclosure Act, with reference to the award made by the commissioners acting under the latter; and as these acts and the award are fully stated by Mr. *Simons*, it will be sufficient to refer to the statement of them contained in his report of the case. (a)

Sir

(a) 5 *Sim.* 87.; the Inclosure Act and the award will be found in pp. 88—93.

1883.
 CHANCERY
 v.
 SUGDEN.

Sir E. Sugden, Mr. Teed, and Mr. Jemmett, in support of the exception.

Mr. Pepys, Mr. Knight, Mr. Hodgson, and Mr. Howenden, contra.

April 15.

The LORD CHANCELLOR said that, with respect to the question arising upon the non-production of the appointment and oath duly subscribed and annexed to the award, he felt no hesitation in affirming his Honor's judgment. Upon the other points, however, which were raised by the exception, his Lordship stated that he entertained considerable doubt; and that he was, therefore, disposed to give the parties an opportunity of having them further argued and investigated.

July 2.

In pursuance of a previous arrangement, made at the suggestion of the Lord Chancellor, the objections to the title to lots 25 and 30, grounded upon the second and third reasons stated in the exception, were again brought on for argument before his Lordship, assisted by Lord Chief Justice *Tindal* and Mr. Justice *Bosanquet*.

Sir Edward Sugden, in support of the exception.

It is material to bear in mind, that this is a case between a buyer and a seller, and that the rule in equity is invariable and universal, never to force a purchaser to take a doubtful title. The same rule has been recognised even in courts of law, where, upon an action against a purchaser for breach of contract, the judges have held the doubtfulness of the title to be a good defence, without absolutely deciding either way on the

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the question of its validity. The Court has now therefore to consider, not merely whether the title must be certainly and necessarily bad, but whether having regard to the opinion which other judges may possibly form with respect to it hereafter, it is not involved in so much doubt that a purchaser should not be compelled to accept it. It is also to be observed that in awards under inclosure acts, the allotments are always made in respect of other and previously existing rights. Whatever therefore may have been the charges, incumbrances or limitations affecting Mr. *Strode's* title to the manor, the allotment to him as lord will be subject to the same; and so in like manner in the case of the other allotments; and when the vendor who has sold an allotment has to make out his title to it, he must make out his title to the land or other interest, in respect of which the allotment was awarded. Another observation is that, if commissioners under an inclosure act do not strictly pursue the directions of the act, their award is utterly void at law, whatever may be the consequences, even if the inclosed common should be thereby again thrown open. It is possible indeed, that a person taking lands under such defective award may be able to hold his allotment against all the world. In trespass he may not be bound to shew a title to that in respect of which he received the allotment; and still he may be unable to carry that allotment to market, because he cannot shew in respect of what interest it was made, or to what uses it is subject. Such a title is merely possessory, and it is not one with respect to which a vendor has a right to say that a purchaser shall be compelled to accept it.

1833.

Chancery
v.
Strode

Many cases have established the proposition that unless inclosure acts are literally followed according to their fair and reasonable construction, the awards made

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CASAJOY,
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STRODE.

under them are absolutely void; *Cooper v. Walker* (a), *The King v. The Inhabitants of Washbrook*. (b) It is not enough that the spirit of the act has been pursued. There would be no safety if commissioners were at liberty to exercise a discretion, and to proceed according to what they might suppose was the equity or general purview of the act; *Wingfield v. Tharp*. (c)

To apply these principles to the present case, the purchaser contends first, that with respect to lot 25, which is admitted to consist in part of land allotted in respect of what is called Mr. *Strode's* "right, title, and interest in the said warren," no title whatever has been shewn, to any warren or right of warren; and secondly, that if a title had been shewn, still that the commissioners possessed no authority under the act to make any award in respect of it, and that as they have exceeded their power in that particular, their award is consequently void.

What does this award on the face of it purport to do? First, it gives to Mr. *Strode* and his heirs an allotment containing 102 acres of freehold land, described as surrounding the warrener's house and garden, and which is declared to be, in the judgment of the commissioners, a full compensation for his "right, title, and interest in the said warren;" although a warren is nowhere previously mentioned, and the commissioners could have had no information before them as to any right of warren belonging to Mr. *Strode*. Then it proceeds to make a second allotment to him of another piece of land containing eighty-one acres, as a full compensation for all his right and interest in the soil

(a) 4 B. & Cress. 36.; and see *Cooper v. Thorpe*, 1 Swans. 92.

(b) 4 B. & Cress. 732.

(c) 10 B. & Cress. 785.

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rener's house, yard, and garden at *Lodge Hill*, and the warren at *Northaw Common*." If, however, a warren ever existed at *Northaw* as a corporeal hereditament, of course it must have been the subject of distinct conveyance and of several enjoyment; yet nothing of the kind is shewn. The truth, probably, is, that Mr. *Strode*, in the exercise of his right as lord, kept rabbits on the waste, and that these animals overran a large portion of it; that, for the protection of the rabbits, the lord built a cottage and inclosed a garden, which were occupied by persons who took care of the rabbits, and to whom the title of warrener was afterwards applied. These were mere encroachments on the waste, and furnish no evidence whatever of the existence of any warren as a corporeal hereditament; and the fact that Mr. *Strode* allowed the commissioners to make allotments on that part of the waste on which the rabbits were kept, raises the strongest presumption to the contrary.

Assuming, however, the existence of a warren inclosed as a park, what right had the commissioners over it? If it was enjoyed as a sole and separate estate, it could not be parcel of the common, in respect of which alone the commissioners had authority to make allotments. If, again, it was nothing more than an interest enjoyed with, and arising out of *Strode's* right to the soil, his right to the tithes, or his right of common, all these rights were compensated by the three several allotments stated to be made on account of them respectively; and those allotments, together with that of the 102 acres, are expressly declared to be a full compensation for the whole of Mr. *Strode's* right and interest in all the lands directed to be inclosed. It is impossible, therefore, to point out any right, title, or interest in respect of which the allotment of the 102 acres could be made; and the result is, that the commissioners,

missioners, in making it, have exceeded their powers, and that their award is void. How far these circumstances may affect the award in other respects, and the general rights of the parties holding under it, it is unnecessary to speculate. At present the Court has nothing to do with such inquiries, being confined simply to the consideration of its effect in a question occurring between a buyer and a seller. At law, the vendor may be able to defend his possession against a trespasser without being obliged to shew his title, and yet he may be unable to make a good title to a purchaser. In suits for specific performance, when bills are dismissed on the ground that a marketable title cannot be given, it is not pretended that therefore the title can be assailed, or the purchaser evicted. It may be an excellent holding title, and yet not a marketable one. But the rule of the Court upon the subject is settled, that, unless the title be free from all objections — good not only to hold but to convey, a purchaser is not compellable to accept it.

Mr. Pepys, contra.

The only question to be now argued is whether the commissioners had power to make the allotment part of which is comprised in lot twenty-five of *Mr. Drake's* purchase: how far there is any evidence of *Mr. Strod's* title to a warren is another and at present an immaterial consideration. Now the judgment of the Court in *Phillips v. Maile (a)*, where it was ruled that, after the time limiting the right of appeal had expired, it was unnecessary for a party holding an allotment under the award of commissioners in an inclosure act to shew the original right, in respect of which the commissioners made the allotment,

(a) 7 Bing. 133.



1833.
 GAYLARD v.
 STRODE.

allotment, completely concludes the question. The time within which an appeal from the award of the commissioners under the *Northaw* Inclosure Act could be brought, has long since expired. The commissioners not having resorted to the means provided by the statute for disputing the award are now absolutely barred—and it is no longer competent for any person to challenge, much less to avoid it. The title therefore to this allotment is good against all the world. What possible right can be set up adverse to that of Mr. *Strode*? The authorities upon which the purchaser relies were all cases where the commissioners had not followed the directions of the act of parliament. In *Cooper v. Thorpe* (a), in which Sir *T. Plumer* thought the title sufficient, Lord *Eldon* entertained doubts and directed an action to be brought; and the court of law (b) there held, what nobody now disputes, that the commissioners had exceeded their authority and that upon that ground their award was void. If, however, the commissioners keep within their authority, whatever errors they may commit in the mode of executing their office, their award if not appealed from in the prescribed form and in due time is final and conclusive against all persons. Mr. *Strode* is admitted to have been lord of the manor; his title to the manor is not impeached. The commissioners ascertained the limits of the waste, and they included the warren as being within and forming part of it. The old survey or rental book and the deed of 1746 clearly prove that a warren existed on *Northaw Common* as early as the middle of the last century. There is no evidence indeed of the origin of the title, but Mr. *Strode* being in the enjoyment of this warren, he had a right to claim compensation for it; and the commissioners being satisfied of the justice of the claim awarded him the land in question. The ques-
 tion

(a) 1 *Swans*, 92.

(b) *Cooper v. Walker*, 4 *B. & Cress*, 36.

tion is, were they authorised to entertain such a claim? If they were, the extent and value of the claim, the *plus* or *minus* of the allotment goes for nothing, the commissioners being the sole judges of the proportions to be allotted, and any mistake or unfairness in that respect being properly the subject of appeal from their award. The *Northaw* Inclosure Act recites as facts that *Strode* was lord of the manor and as such entitled to the soil and royalties within the same; that he was also lord rector, and that he claimed right of common on the waste in respect of the soil and royalties; and the commissioners are thereby empowered to deal with all *Mr. Strode's* rights. We have it then as a fact that there was held by the lord and used by the lord, a warren; he excluded the other commoners it might be originally an encroachment, but it was a right claimed and enjoyed by the one against the others. The royalties it is said are specially reserved, but the reservation is probably to be confined to matters *ejusdem generis* with the mined minerals, and quarries spoken of in the preceding clause; that is, royalties under the soil.

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Graham v.
Strode

It is unnecessary, however, to contend that the claim of warren was a royalty at all. To make it so there must have been a royal grant. If it is asked what was the nature of the right of warren; the answer is that it was a warren on the waste, and that it constituted a claim which by the very terms of the inclosure act the commissioners were empowered to look into and give compensation for. Here, then, is an allotment made to *Mr. Strode* in respect of that claim; and the award is conclusive as to all claims in respect of which the commissioners had jurisdiction. The purchaser cannot point out any person who is now competent to dispute it. The form of the award is immaterial. The commissioners were at liberty either to throw *Mr. Strode's* compensation into three allotments, one for his right as

1833.
Quesada v. Storer.

lord, another for his right as lay rector, and a third for all his other claims; or to follow the course they have adopted, and finding two distinct rights claimed by him under the last head, namely, a right of warren and a right of common, to make distinct allotments for each. The objection is one of mere form, for if the 102 acres had been included in the allotment given to the lord for all his other rights and claims, no possible doubt could have been raised. The legislature has not directed the commissioners in allotting the residue to give so much for one right and so much for others—but neither has it forbidden them: and as they were not controlled in that respect by the act, they have followed the course which was probably most convenient for all parties.

Sir Edward Sugden, in reply.

1834.
 Feb. 13.

The LORD CHANCELLOR, on behalf of himself and the learned Judges who assisted him, delivered the following judgment:—

The question is, whether a good title can be made to lot No. 25., part of the *Northaw* estates, lately belonging to *William Storde*, Esq., with reference to the power of the commissioners under the *Northaw Inclosure Act*, passed in the forty-third year of *George 3.*, and to the form of the commissioners' award.

It appears by the recitals of that act, that Mr. *Storde* was the lord of the manor of *Northaw*, and as such lord, was entitled to the soil and royalties of and within the same; that as lay rector of the parish he was entitled to all tithes both great and small, arising within the same, and that he claimed right of common in respect of the said soil and royalties on the said waste land and common.

The

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The act then proceeds, after providing for the appointment of commissioners and the deduction of such part of the waste as might be necessary for highways, roads, and drains, to direct the commissioners to allot, and award unto the said *William Strode*, as lord of the said manor, as a compensation for the soil of the waste land and common, one full eighteenth part, quantity and quality considered, of all the residue of the said waste land and common over and above and exclusive of the allotments thereafter to be made, and as an equivalent for his right of common thereon, and also as a compensation for his impropriate tithes, one eighth part of the residue of the said waste land and common, and then to set out and divide all the residue of the said waste land and common unto and amongst the said *William Strode* and the several other persons having any right of common upon such waste land and common, in proportion to their respective claims.

Now, the commissioners by their award, dated the 29th of *August* 1806, made four distinct allotments to Mr. *Strode*, in respect of four distinct rights or claims of his.

First, they allot to him and his heirs a piece of freehold land, containing 102 acres, entirely surrounding the warrener's house and garden, which they declare to be in compensation for all his right, title, and interest in the said warren. Secondly, they make an allotment to him of 81a. 3r. 30p. which they declare to be a full compensation for all his right and interest in and to the soil of the common and waste ground in the parish of *Northaw*. Thirdly, they allot to him, as lay rector, two pieces of freehold land, containing together 172a. 12p. therein described, which they declare to be a full compensation

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1834.

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pensation to him for all his impropriate tithes within the parish. And, fourthly, they divide, set out, and allot to the said *William Strode*, and the other proprietors respectively, all the residue of the lands and grounds directed to be inclosed, which they declare to be a compensation for their several and respective rights of common, and other their rights and interests therein; and after describing particularly the different allotments made to the said *William Strode*, they declare them to be a full compensation to him "for all his right, title, and interest in and to all the lands and grounds within the said parish of *Northaw*, directed to be divided and inclosed."

No question can arise in this case as to the allotments secondly and thirdly and lastly above made, for there can be no doubt that the commissioners had the right to give, and that they have accordingly given to Mr. *Strode*, allotments for his right of soil, as lord of the manor, for his impropriate tithes, as lay rector, and for his rights of common and other rights in respect of his lands within the parish.

But the question is, whether the commissioners had any authority to make the first allotment to him for and in lieu of his right, title, and interest to and in the warren; and we think that, upon the due construction of the act, the commissioners had no authority to make such allotment, and, consequently, that, so far as depends on the power of the commissioners under the act of parliament, Mr. *Strode* cannot make a good title to such allotment. The precise form of the claims sent in by Mr. *Strode* has not been brought before the Court; but looking to the allotment first made, there can be little doubt that one of the claims was for a compensation for the right of warren over the waste land and common which

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was to be divided under the act, or some part thereof; for the form of the allotment is "a piece of freehold land entirely surrounding the warrener's house and garden," which they declare to be in compensation for "all his right, title, and interest in the said warren." The award itself shews that there had been a house upon the waste known as the warrener's house and garden, and the allotment was evidently given as a compensation for a claim of warren.

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Grahamson
v.
Swing

The first point, therefore, to be ascertained is, whether a right of warren was a right which it was intended the commissioners should have authority under the act to extinguish.

The right of warren in its proper sense is a privilege distinct from the land, a privilege which a man claims by grant or prescription to have beasts of warren in his lands or demesnes, "ita quoad nullus intret ad fugandum vel ad capiendum quod ad warrenam pertinet" (2 *Rol. Abr.* 812.) Such a right was, therefore, in the common use of that word, a royalty belonging to Mr. *Strode* either by prescription or grant, as lord of the manor, over the common or part of the common or waste lands intended to be inclosed. It appears, indeed, by the recitals of the act, that Mr. *Strode* claimed some royalties, and the recital further states, perhaps somewhat inaccurately, that he claimed right of common in respect of the royalties as well as the soil.

Now, that the commissioners had no direct authority to give an allotment as a compensation for a royalty, appears by the enumeration already made of the authorities conferred upon them by the act, amongst which there is no mention of a power to grant such compensation; and it appears still further from the saving clause

1854.
 CHANCERY
 v.
 STREDE.

clause in the act, that it was not the intention that the royalties should be extinguished; for by that clause the seignior and royalties are reserved to the lord, with particular provisions in respect of the exercise of the royalty of mines.

But it has been argued on the part of the sellers, that it is not necessary to consider the warren as a royalty, but that it may be well understood to mean, in common parlance, a place in which rabbits or other animals of warren are kept. It does not, however, appear to us that the difficulty is removed by such an interpretation. For if the word "warren" is used by the commissioners in their award as applied to a portion of the common or waste land, in which the lord of the manor claimed and exercised the right of having rabbit burrows on the surface, the soil of such common or waste land being already in the lord, it is still necessary to shew under what power in the act the commissioners extinguished the right of the other commoners over this part of the common. For the award cannot give a title to allotments in respect of rights, which are not authorised to be extinguished under the powers conferred by the act.

The decision, therefore, of the Court of Common Pleas in the case of *Phillips v. Maile* (a), does not apply to the present case. In that case no other point was decided, than that it was unnecessary for the party who claimed a right of common which had been allotted to him by the commissioners under an inclosure act over a certain limited inclosure, as a compensation for a right of common over a larger waste, to state in his pleadings his title to his original right of common; for

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(a) 7 Bing. 135.

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as such title had not been disputed in the mode prescribed by the act, it was held that it must be taken to be admitted by all who were parties to the award. But here the objection is widely different; it lies upon the surface of the award, the commissioners having adjudicated an allotment in respect of a right for which the statute gave them no authority to grant any compensation. It appears, therefore, that the allotment as a compensation for the right of warren, is to be considered as if the portion of waste land whereof it consists had not been allotted at all; and if this were the case, the representatives of *Mr. Strode*, in respect of his right of soil, would be entitled to one eighth part only of the 102 acres comprised in that allotment in respect of his impropriate tithes, and the proprietors having right of common (including *Mr. Strode*), to all the rest.

1884.
P. 101.
CASA MAZON
v.
STRODE.

It may be said that *Mr. Strode's* right to the soil having existed before the act of parliament, his title to the soil is independent of the award, and that all rights of common over it have been extinguished by the compensation received by the commoners under the award. But if the commoners on their part have received compensation for all their rights of common over the 102 acres in question, *Mr. Strode* has also on his part received compensation for all his right of soil in the same portion of the waste. The compensation to both, however, has been made out of a fund, a portion of which remains undisposed of by any legal authority.

It may be difficult, practically speaking, to point out any mode by which *Mr. Strode's* representatives at this time, after an adverse enjoyment since 1806, could be disturbed in the exclusive possession of the land comprised in the allotment, but still, upon the question whether *Mr. Strode* acquired a title to this allotment under

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v.
STRONG.

under the commissioners' award, we think that no such title was acquired.

Feb. 21, 22.

The Court will not upon motion determine whether several lots, forming part of one estate, and bought at the same sale by one purchaser, are or are not so intimately connected in use and enjoyment, that the failure of title as to one, will furnish a defence against specific performance as to the rest. Such an objection raises a question of facts, which ought either to be put in issue upon the pleadings, or be the subject of investigation upon a special reference to the Master.

The purchaser having been released from his purchase of lot 25, in consequence of this decision, a motion was now made on his behalf, that he might also be released from his contract as to lot 30. The motion was supported by affidavits verifying the facts on which the application was grounded. These facts are sufficiently stated in the judgment; in which also the authorities referred to on both sides are all mentioned and considered.

Sir *E. Sugden*, for the motion.

The Solicitor-General (Mr. *Pepys*) and Mr. *Knight*,
contra.

March 4.

The LORD CHANCELLOR (after stating the effect of the previous proceedings):

This is an application by Mr. *Drake* to be discharged from his contract for the purchase of lot 30, not upon the ground of any of the various objections already discussed and disposed of; but simply on the ground that inasmuch as lot 25 is gone, and lot 30 was purchased subsequently to lot 25, and has not, like the latter, any mansion or buildings upon it, but consists merely of fifty-eight acres of land, the one cannot be conveniently occupied and enjoyed without the other; the argument being, that as the purchaser never would have bought
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lot 30 but for his having bought and expected to possess lot 25, he should, therefore, also be released from his contract as to lot 30. The objections hitherto urged against the title to lot 30 were primary objections, not depending at all on the having or not having lot 25. A secondary and derivative objection is now made that the two lots were connected, and that, the contract for lot 30 depending on the contract for lot 25, both contracts must be taken as one, and held to be now at an end.

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CANAWAHOE
v.
STROUD.

No such objection to the completion of the contract was urged before the Master. The only objections to the title to lot 30 were either those taken to it in common with lot 25—as that the commissioners under the Inclosure Act had not duly qualified, &c.; or that sixteen acres, parcel of it, were not well identified; and that the land tax on those sixteen acres was not shewn to be redeemed. It may be observed in passing, that the present objection might have been taken prospectively, and, as it were, contingently, for it might have been urged, first, that the title was liable to the foregoing primary objections, and independently of the title to lot 25 being found good or bad; and next, that at all events, if no title to lot 25 could be made, lot 30 was so complicated with it as to be untenable if lot 25 was not obtained. For the present purpose, however, it is enough that this objection has never been made the subject of regular investigation; it has not been taken by way of answer to a bill calling for a specific performance (which the present bill was not) so as to be put in issue, which is one mode of raising the question; nor has it been made the ground of objection before the Master upon a reference of title. It is only suggested by arguments and observations arising upon affidavits in the cause, and I am of opinion that it cannot in this
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form be successfully used by a purchaser seeking to be let off from his contract.

Although this is enough to dispose of the present motion, yet the importance of the question which it raises, in a country where so many sales in lots, by auction and otherwise, are continually taking place, and the conflicting doctrines which have been sometimes ventilated upon the subject, induce me to enter a little further into the discussion.

Lord *Kenyon* is reported to have held at *Nisi Prius*, that where a party purchases several distinct lots at a sale, (in the case before him it was houses), and a title to one of the lots cannot be made, the purchaser is at liberty to repudiate the whole, so that he shall be loose as to the other lots, while the seller is fast; and this upon the supposition that the whole contract is necessarily entire; *Chambers v. Griffiths*. (a) That this is not a sound doctrine at law any more than in equity, I hold to be very clear. Lord *Eldon* is said to have expressed a similar opinion in *Drewe v. Hanson* (b), but if so, it has escaped the reporter. The proposition is, indeed, in some measure sanctioned by a faint *dictum*, for it is nothing more, in *Boyer v. Blackwell* (c), where, upon a suggestion at the bar that as the purchaser had taken contiguous lots in confidence of having both, he ought to have an option of opening the biddings as to the one, if the other were taken from him, the reporter says, "The Court inclined to think this reasonable, but the purchaser chose to keep the other lots." This clearly proves nothing; the case of *James v. Shore* (d), before Lord *Ellenborough*, is distinctly contrary to *Chambers v. Griffiths*,

(a) 1 *Esp.* 150.

(b) 6 *Ves.* 675.

(c) 3 *Anst.* 656.

(d) 1 *Stark.* 423 .

Griffiths, which was also plainly overruled in a late case in the King's Bench, of *Roots v. Lord Dormer*: (a) It is to be observed that, in neither of these cases, was *Chambers v. Griffiths* cited; a circumstance strongly confirming a suspicion suggested by the very inaccurate reference to *Poole v. Shergold*, that the report of *Chambers v. Griffiths* is not to be relied upon.

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CHAMBERS
v.
SHRODE.

If Lord *Kenyon*'s reported opinion, but which he probably never held, carried the rule so much too far in favour of the purchaser, perhaps an opinion ascribed to Lord *Eldon*, and mentioned in Sir *Edward Sugden's Treatise on Vendors and Purchasers*, and in the note to *Raffey v. Shallcross* (b), carries the rule almost as far the other way — that the purchasers of different lots are not to be connected together, unless there has been an understanding that the buyer should not take any if he could not have all. Clearly such an understanding will suffice to blend the whole into one contract; but it seems equally clear that the same complication may be effected, or rather evidenced, without any such understanding; that is, without any express agreement to this effect. It is a question of circumstances; the lots may be connected from their nature; it may be shewn that the purchase of the one was made with reference to the other. A mere suggestion of the party, a mere statement of his inclination, or fancy, will not be sufficient; nor may the proof of any thing of a private nature, not known to the vendor, suffice; but where, upon matters known to both parties, he can ground his proof that the one transaction was dependent on the other, he complicates the two, so as to make the contract one, although there may have been no express statement that he was to take none if he might not have all,

(a) 4 B. & Adol. 77.

(b) 4 Mad. 327.

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all. It is further to be observed, that Lord *Eldon* decided contrary to the opinion referred to in *Ex parte Tilsley*. (a)

An examination of the authorities will lead to the conclusion that this is the sound principle—placed in the mean between the two extreme opinions ascribed to the learned Judges, whose names have been mentioned, and will confirm the grounds upon which I have stated it as my opinion, that the derivative objection now taken cannot be allowed to prevail without a more full inquiry.

Upon the greater number of the cases cited in support of the motion, Mr. Solicitor-General observed that, as they related to the question of opening biddings, they had no application. In that observation I do not agree. If the decisions are founded upon similar objections to the one raised here; if they shew that the purchaser of a lot on which the biddings are not opened is let off, because, having but one, he needs not take the other on account of certain circumstances connecting the two together, undoubtedly those decisions are strictly in point; for the purchaser, but for the order releasing him, would be bound to take the lot on which the biddings had not been opened.

Roffey v. Shallcross (b) is not at all decisive of a question like the present. The purchase there was of two sevenths of an estate, in one lot; and if a title could only be made to one seventh, the purchaser had clearly not got that which he desired to have, viz. two sevenths; and no proof was requisite to shew that the part with, and the part without title were complicated together, so

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(a) 4 *Mad.* 227. n.

(b) 4 *Mad.* 227.

as to make the purchase joint (for the parts were undivided parts, and were in one lot), even more than if a title could only have been made to half the number of acres in one lot. Accordingly the decree, as given by Mr. *Belt* (a), sets forth their lying in one lot as the ground of the decision. The principle adverted to, rather than laid down, in *Price v. Price* (b), cannot certainly be assumed as furnishing an inflexible rule; namely, that where one lot has been bought before another, and the title to the first fails, the purchaser shall be let off from the second purchase, upon the ground that it must be concluded he would not have bought the second had he not reckoned on having the first. This circumstance of the one purchase by the same party being subsequent to the other, may often, no doubt, be the ground of a very strong presumption; but many cases may be figured in which it would prove nothing at all. The Court can only have treated it as a circumstance tending to shew the connection of the two contracts. The application, there, was not on the motion of the purchaser, but in consequence of the Court being moved to open the biddings.

Poole v. Shergold (c) was decided by Lord *Kenyon*, whose judgment is best reported by Mr. *Cox*. To two lots no title could be made; the purchaser was, of course, let off as to those, and then he insisted on being also released from his purchase of the others, as to which the Master had only reported that the case was one for compensation. Lord *Kenyon*, however, decreed him to take all but the two to which the title was defective, observing, at the same time, that the Court had gone great lengths in compelling parties to proceed with their purchases,

(a) 2 Bro. C. C. 113. n.
(b) 1 Sim. & Stu. 336.

(c) 2 Bro. C. C. 118. 1 Cox,
275.

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purchases, but that he clearly thought a case might be made where want of title to a part might be a sufficient reason for putting an end to the whole contract; and he mentioned, in terms of strong reprobation, the case before Sir *Thomas Sewell*, where, although no title could be made to that part of the estate which was the principal object in making the agreement, the purchaser was forced to complete his contract as to the rest. His Lordship added, however, that in the case before him he was bound to suppose there was no such connection or complication between the lots; plainly because, as the Plaintiff's counsel had argued, the report was silent upon the subject.

In *Knatchbull v. Grueber* (a), where the want of title to twelve acres in a purchase of 700, was held enough to set the buyer free, those twelve acres were so near the mansion house, being opposite the park gate, that they were essential to the enjoyment of the estate; and besides, as they contained brick earth, they were not unlikely to be built upon. The evidence in the cause, it must be observed, had here been taken expressly as to the point whether or not the possession of that piece of land was essential to the enjoyment of the rest; and, therefore, there was no occasion to direct an inquiry before the Master. From the report of Lord *Eldon's* judgment when the case came before him upon appeal (b), it is clear that, though he affirmed the decree upon another ground, he inclined to think the twelve acres material; but it is important to remark that his Lordship dwells upon the fact of this materiality having been put in issue. He says, indeed, that he "apprehends the Court is not always bound to send this point to the Master,

(a) 1 *Mad.* 155.

(b) 3 *Mer.* 124.

Master, but may decide for itself if the evidence before it is sufficient to enable it to do so." In another part of the judgment he says, that "the nature of the land is not so put in issue as to enable the Court to determine as to its materiality." No one can read that judgment and think that Lord *Eldon* would have disposed of the question of letting off a purchaser on account of matters not put in issue (and consequently not investigated) either by the answer or by the depositions, and on which there had been no reference to the Master.

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In *Dalby v. Pullen* (a) the question of title arose in a suit to establish a will, and as to one of the points there discussed, the letting off a purchaser of a lot, to one undivided seventh of which a title could not be made, it is only a repetition of *Roffey v. Shallcross*. The rest of the case shews strongly that the present application cannot be granted without further inquiry. In that case the Master having upon a reference reported in favour of the title, and the money being directed to be paid into Court, all necessary parties were ordered to join in the conveyance. The title, however, was complicated, and a considerable time elapsed before the conveyance could be completed, and on the eve of the deeds being executed, a claim adverse to the testator's title was set up, and on the ground of this claim a motion was made to discharge the purchaser. The affidavits stated the nature of the claim, and nothing certainly could be more clear if the facts were true; for the testator's title was only as heir-at-law of his brother, five years older than himself, and the new claimant was stated to be the son of an intermediate brother. It was further

(a) 3 Sim. 29.

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further sworn on the purchaser's part, that the Plaintiff had stated his having been informed ten years ago by his solicitor of an heir-at-law other than the testator being in existence. In answer to these affidavits, the Plaintiff's solicitor only swore that at the time of preparing the abstracts he believed the testator to be the heir-at-law of his elder brother, and that he had at that time never heard it questioned; and he added circumstances which had confirmed him in that belief. A case more clear than this, as it stood upon the affidavits, is hardly to be conceived. In fact, the purchaser's affidavits were wholly uncontradicted, and yet the Court referred it back to the Master, with a direction to receive such further evidence as the parties might think fit to adduce, although, with the exception that a good title had been reported before the discovery of the adverse claim, *Dalby v. Pullen* was a stronger case than the present for calling upon the Court to decide without a further reference. It was a case too into which fraud entered somewhat largely.

It may therefore be concluded, that in determining whether a purchaser who fails to obtain a good title to one lot, shall be let off from his contract for another, the whole circumstances may be examined in order to prove that the two contracts are one, by shewing that the two parcels are complicated together, and that upon the whole transaction the Court will determine as a jury would, the question, did or did not the party purchase the one with reference to the other; would he or would he not have taken the one, had he not reckoned upon also having the other.

The objection may be raised by being put directly in issue, or it may be raised before the Master, according
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to the nature of the suit, but it cannot be raised and disposed of upon motion. Nor is it any exception to this rule, that where biddings are opened against the purchaser (as in *Price v. Price*), he may move to be relieved from his contract. In that case the purchaser does not take the objection by way of motion, as he seeks to do here; but he is called upon to meet a motion against him in respect of one lot, which motion he resists. Failing in his resistance, he has no other course left but to apply for his discharge from the rest of his engagement.

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STRODR.

Mr. *Drake* cannot, therefore, have his present application granted; but he may carry in his new and secondary objection to the Master.

The reference to the Master was not prosecuted, the parties having come to an arrangement, by which the purchaser was released from his contract as to lot 30.

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Feb. 1. 3.

HARDMAN v. ELLAMES.

A plea, that the title of the Plaintiff accrued in 1759, and that the possession of the estates had been, ever since, adverse to the Plaintiff and to the persons through whom he claimed, was over-ruled, because it did not state the particular facts on which the Defendant meant to rely, as constituting the adverse possession; and, therefore, the Plaintiff could not know what case he had to meet.

A plea of adverse possession to a bill charging that the Defendant has in his custody documents shewing the Plaintiff's title, must be

accompanied by an answer denying that charge.

If a Defendant in his answer states the effect of documents admitted to be in his possession, but for his greater certainty craves leave to refer to the documents themselves when produced, the Plaintiff is entitled to move for their production, although the answer positively swears that they form part of the Defendant's title, and in no way assist or make out the title of the Plaintiff.

THE Plaintiff by his bill claimed a moiety of certain estates in the possession of the Defendant *Ellames*, as heir at law of the testator *John Hardman*, under an ultimate remainder in the will of the testator, expectant upon the deaths of the testator's nephews *John Hardman* and *James Hardman* successively, without issue, to his own right heirs; and *Ellames*, by the leave of the Court, put in two pleas to the bill.

The case is reported in 5 *Sim.* 640, where the material allegations of the bill are set forth.

The Vice-Chancellor over-ruled both pleas, and the Defendant *Ellames* appealed from his Honor's decision.

Sir *E. Sugden* and Mr. *Booth*, in support of the pleas.

The first plea is, that the title stated by the Plaintiff accrued in 1759, and that there has been possession adverse to the Plaintiff ever since. One objection taken by the other side was, that adverse possession was not a sufficiently definite and technical expression; but that expression is recognised as a term of art by Lord *Mansfield* and by Mr. Justice *Aston* in *Doe v. Prosser*. (a) "What is adverse possession or ouster," says Mr. J.

Aston

(a) *Cowp.* 217.

Aston in that case, "if the uninterrupted receipt of the rents and profits without account for near forty years is not?" So, in *Peaceable v. Read* (a), Lord *Kenyon* observed, "he had no hesitation in saying where the line of adverse possession begins and where it ends;" and in the late act of 3 & 4 *W. 4. c. 27. s. 15.*, the expression "adverse possession" is used as a recognised term of art. Since the second case of *Cholmondeley v. Clinton* (b), it has been the settled rule of the Court, that no relief in equity will be afforded to a party, where twenty years have been suffered to elapse from the time at which the right accrued, without any step having been taken to enforce it. In this case the Plaintiff claims the assistance of the Court to enable him to recover a legal right which accrued upwards of sixty years ago, and without even alleging any disability or shewing any reason why he has not sooner attempted to establish his right. The Vice-Chancellor, however, was of opinion that the plea was bad, because it did not state the circumstances of adverse possession, so that the Plaintiff might know the exact nature of the defence. Had that course been taken, the Defendant would have over-ruled his plea; *Thring v. Edgar* (c); and this was, in fact, admitted by the Vice-Chancellor himself in his judgment. A plea must be a short point, and the Defendant is, no doubt, bound to raise that point distinctly, so that if the plea be replied to, and come to a hearing, there may be no doubt about the matter in issue. Can there be any doubt here about the matter in issue? We say there has been a possession adverse to the Plaintiff since the year 1759, and if he goes to issue upon that plea, and can shew that he, or those through whom he claims, have been in possession or in the

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(a) 1 *East*, 568.

(c) 2 *Sim. & Stu.* 274.

(b) 1 *Turn. & Russ.* 107.

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the receipt of the rents and profits since that time, he will be entitled at once to a decree. A negative plea, therefore, is as dangerous to the Defendant, as it is advantageous to the Plaintiff, if the latter is in a situation to prove the fact denied by the plea.

As to the other ground of the Vice-Chancellor's decision, namely, that the plea ought to have been accompanied by an answer to the common charge, that the Defendant had documents in his possession which would prove the truth of the matters alleged in the bill, that is inconsistent with the same Judge's decision in *M'Gregor v. The East India Company* (a), where his Honor held that a plea of the statute of limitations need not deny the common documentary charge unaccompanied by any distinct allegation that the documents, if produced, would shew that the Plaintiff's case was within the statute. Here there is no allegation that the production of the documents would shew that the Plaintiff was not barred by lapse of time; and the matters stated in the bill, to which alone it is charged that the documents relate, shew that the Plaintiff is barred.

The rule as to double pleading is different in courts of equity from that which is followed in cases at law where double pleading is permitted by the statute (b); for here, if either plea should be of itself insufficient, we may rest our defence upon both pleas taken together: *Gibson v. Whitehead*. (c) If there is sufficient upon the face of the bill to shew that the Plaintiff, or those under whom he claims, have never been in possession or in the receipt of the rents and profits, then the second plea will be a good defence, even if the first should be insufficient; and if neither the first

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(a) 2 Sim. 453.

(b) 4 & 5 Ann. c. 16.

(c) 4 Mad. 241.

nor the second plea should be of itself sufficient, then the two pleas may be taken together, and will constitute a good defence.

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Mr. Knight and Mr. Jacob, *contra*.

In *Gibson v. Whitehead* leave to plead double was given under very special circumstances, and the application was not opposed. That was the first case in which double pleading was allowed in this Court, and there is no foundation whatever for the proposition that two pleas can be united for the purpose of constituting a good defence, each of them being separately bad. In fact, the very application for leave to use two pleas shews that they cannot be so united. If either of the pleas can be sustained, the Plaintiff's case is out of Court; and if they are both bad, it necessarily follows that they must both be over-ruled. It is an inflexible rule that several matters cannot be joined in one plea; and if two pleas be joined, they become, for the purpose of applying this rule, one plea. The objection to the plea of adverse possession, on the ground that it is not supported by an answer to the documentary charge, is fatal. The rule is, that a defendant cannot plead to the whole bill, and withhold documents in his possession, which, if produced, would fortify the allegations in the bill. In *Thring v. Edgar* (a), the plea of "no debt," was a complete bar to the whole discovery as well as to the relief, and there was no special allegation in the bill seeking the discovery of any circumstances by which the existence of the debt was to be established. The defendant, therefore, over-ruled his plea by answering as to the debt. In *M'Gregor v. The East India Company* (b), the plaintiff's charge was, that the defendant had in his possession

(a) 2 Sim. & Stu. 274.

(b) 2 Sim. 452.

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sion papers relating to the matters aforesaid, and by which, if produced, the truth of the matters aforesaid, or of some of them, would appear. Now the matters aforesaid to which the documents were charged to relate, might well be matters to which the plea had no reference, and the production of which was wholly immaterial; and this was, in point of fact the case; for the defendant pleaded the statute of limitations, and there was no part of the bill which alleged that the promise was made within six years. In the present case there is a distinct allegation in the bill that the Defendant *Ellames* accounted, after the death of the testator's widow in 1815, with her representatives for a moiety of the rents; and, taking that to be the fact, there is an end to the plea of adverse possession since 1759. This, therefore, was an allegation of a material collateral fact, which, according to the authorities, the Defendant was bound to negative by answer.

In *Emerson v. Harland (a)*, where to a bill filed by persons claiming title as co-heirs of *A. ex parte materná*, and charging that the defendants had frequently admitted, by correspondence, the plaintiffs' title, the defendants pleaded that another person was the heir of *A. ex parte paterná*, that plea was over-ruled because the defendants did not support it by an answer denying the correspondence. The second plea in the present case has been twice over-ruled, and the vice of the first plea is, that it does not enable the Plaintiff to know the nature of the case which he has to meet.

Sir *E. Sugden*, in reply.

Gibson v. Whitehead supports the proposition that two pleas, though each of them may be separately insufficient,

sufficient, may be united for the purpose of constituting a good defence; for in that case the Court permitted the defendant to plead separately two facts, neither of which alone would have been of the slightest use as a defence to the bill. *Thring v. Edgar* has always been followed; and *McGregor v. The East India Company* was not decided, as has been supposed, upon the narrow ground that the defendant had used the words "some of them" in the general charge as to documents — an expression which is almost always used — but upon the ground that, as there was no distinct allegation of a promise within six years, it was unnecessary for the defendant, in pleading the statute of limitations, to answer the general allegation as to the possession of documents. The argument on the other side is founded mainly upon the supposition, that there cannot be a general statement by way of plea to a number of particular allegations, but that a plea must be so framed as to point out to the plaintiff the nature of the defence which he must make against it. There is no foundation for that supposition. Take for instance a plea of no heir. That is a good plea, because the defendant undertakes to shew that the plaintiff has no title as heir, but he is not bound to state how he will shew it. He may establish his plea in a variety of ways; as, for example, by shewing that the plaintiff is illegitimate, or that he does not belong to the family, or that he claims *ex parte maternâ*, and that there is a paramount claimant *ex parte paternâ*; and it is evident that in such a case the plaintiff is as little informed with respect to the exact nature of the case by which the plea is to be established, as he is said to be in the present case.

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Feb. 3.

The LORD CHANCELLOR.

This is an appeal from a decision of the Vice-Chancellor, over-ruling the Defendant's pleas to the Plaintiff's bill.

The bill states that *John Hardman*, by his will, dated the 1st of *November* 1754, devised his moiety of the manor of *Allerton*, and other premises, to his issue, with remainder to his executors for ninety-nine years, remainder to his nephew, *John Hardman*, for life, remainder to his issue in tail, remainder to *James Hardman* in like manner, remainder to his own right heirs for ever; and he appointed his wife *Jane*, *Jane*, the widow of his brother *James Hardman*, and *James Percival*, his executors. The trusts of the term were for raising jointures for the widows of the tenants for life of the estate.

Jane Hardman, it is then stated, and her representatives, entered into possession of the testator's estate as trustees of the term, and continued to receive the rents until 1815, holding the same, as they admitted, for the persons entitled thereto under the will, and there would then be, after the trusts performed and failure of issue, a resulting trust for the heir at law.

The two nephews of the testator died intestate and without issue, and the Plaintiff thereby became the heir-at-law of the testator, as he alleges. The Defendant *Ellames* had purchased the moiety of *Allerton* which did not belong to Mr. *Hardman*, and he afterwards, in 1815, obtained from the representatives of Mrs. *Hardman* the possession of the other.

The bill prays for the possession of the said moiety of *Allerton*, and the recovery of the rents. To this the
Defendant

Defendant *Ellames* pleaded two pleas: first, That the title of the Plaintiff, or of the party through whom he claims the moiety of the estate in question, accrued on the death of *John Hardman*, the nephew, which is averred to have been in 1759, and "that the possession of the said moiety, and the receipt of the rents and profits thereof, have been adverse to him, the Plaintiff, and the persons through whom he claims, ever since the death of the said *John Hardman*, the nephew;" and, secondly, That the personal representatives of *Jane Hardman*, the widow, did not, nor did any of them, enter into the possession or receipt of the rents and profits of the said moiety of the estates comprised in the term of ninety-nine years, or any part thereof. Both these pleas have been over-ruled by the Vice-Chancellor, and I am of opinion that they were rightly over-ruled.

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First, The mere general plea of "adverse possession," and still more a plea, not only in those terms, but framed with the extreme generality of this plea, is without any warrant, either from precedents or from the rules of good pleading. The term "adverse possession," though of a known signification, is not used in pleading, and very rarely, I think only once or twice very recently, in the language of the statutes. (a) It is a relative phrase, and it means such possession as is inconsistent with another's right, but it may consist in various things, and nothing can be more vague than an averment in bar of a right claimed by *A.* that the thing over which it is claimed has been in a possession adverse to that right, without setting forth by whom, or how, and in what manner such alleged possession has been adverse. This plea gives no information

(a) 3 & 4 W. 4. c. 27. s. 15.

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formation to the party claiming, no notice of the defence he is to meet, and against which he is to prepare himself; for it may consist in various things, none of which are specified, and he is left to mere conjecture.

It was at one time doubted by Lord *Thurlow* whether a negative plea was good; at least he held in *Newman v. Wallis* (a) that a plea of "no heir," was bad without averring who was the heir, but afterwards in *Hall v. Noyes* (b), he altered this opinion on the ground that the defendant might not be able to shew who was the heir, though he might prove that the plaintiff was not. But in that case the plea leaves the plaintiff in no uncertainty as to the point of defence, and raises an issue the affirmative of which is easily perceived, and at once refutes the negative issue of the plea. Upon such a plea as we have here, the Plaintiff could not go to proof with any precise knowledge of what he had to meet, and might never discover it till he saw the Defendant's evidence. It is not very easy to put a case of such a plea as this at law, because in ejectment as the plaintiff must recover on the strength of his own title, and the statute of limitations is a bar to the right, and not merely to the remedy, it is not specially pleaded. But suppose it were, I cannot doubt that it would be bad to plead merely that there had been continually, for more than twenty years before the demise in the declaration, a possession adverse to the title of the lessor of the plaintiff; the analogies of all the cases in courts of equity are on these principles against such a plea. In *Carleton v. Leighton* (c), the defendant pleaded a commission of bankruptcy duly issued, under which the plaintiff was duly found and declared a bankrupt, and thereupon his estate and effects were duly assigned and transferred;

(a) 2 Bro. C. C. 143. (b) 3 Bro. C. C. 433. (c) 3 Mer. 667.

transferred; yet this was held a bad plea of bankruptcy, because it did not state successively and distinctly the material facts, but was in general language. Nor were the averments of the commission being duly issued, and bankruptcy duly found and declared, held sufficient to exclude the possibility of the plaintiff not being in fact a bankrupt.

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In *Jones v. Davis* (a), the bill was for an account of stones taken from the plaintiff's quarry, upon promise by the defendant to keep an account of them and to pay accordingly; and it alleged repeated assurances of the defendant affirming that such account was kept. The plea was held bad for not denying the fact of such account being kept, though it denied that any promise was made to pay or to keep an account, or any thing to that effect; and it was held bad on the ground that the keeping an account would have been evidence to go to a jury of a promise or agreement, such as that stated in the bill; yet it is to be observed, that the fact of the promise or agreement is denied by the plea, and that the keeping the account is not alleged in the bill at all, but only a statement made by the defendant, which might have been untrue. And then, though on another ground, that of fraud, the plaintiff might have prevailed, yet to the issue of agreement or not, that was not material. Again, in *Evans v. Harris* (b), the Court held a plea of the statute of Frauds to be bad, denying explicitly any agreement in writing by defendant or any one authorised by him, or any memorandum or note in writing, because it did not also deny circumstances alleged in the bill as evidence of such an agreement. In *Burston v. Burbidge* (c) in the Exchequer, a plea to a bill for tithes was held good, which set forth that they had belonged

(a) 16 Ves. 252. (b) 2 H. & B. 361. (c) 4 Gwill. 1524.

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belonged to a dissolved monastery, and had been granted by divers mesne conveyances from 31 *Henry* 8., when they were vested in the Crown, downwards till they became vested in the plaintiff, the objection being that the conveyances should have been set out; but this would not have been necessary in pleading at law, and the plea was abundantly certain, and the defence which it disclosed sufficiently plain and precise. When it is sometimes said that the rules of pleading in this Court are less strict than at law, and that the pleadings here may be more loose, perhaps such decisions as these may serve to shew that, regard being had to the nature of proceedings in equity and their great and leading objects, among others that of securing discovery to the plaintiff, and preventing the defendant from evading the right to wring his conscience, the strictness of our rules is to the full as great on this side of the hall as on the other.

In the present case the bill alleges among other things the possession of *Jane Hardman* and her representatives as trustees, from the death of *J. Hardman* senior down to 1815; and the possession of *Jane Hardman's* representatives is denied by the second plea. But *Ellames* is averred in the bill to have accounted for the rents and profits to her representatives; and that, according to the purport of the authorities I have cited, ought to have been denied, which it is not.

The denial of this allegation that *Ellames* accounted to *Jane Hardman's* representatives is the more material, because that allegation goes to negative the first plea of adverse possession; for either the trusts on which *Jane Hardman* and her representatives were in possession (and *Jane's* possession at least is not denied at all) were not fully performed when *Ellames* accounted
 to

to them for the rents and profits, or they were. If they were not, the adverse possession could not have begun; and if they were, then *Jane* and her representatives were trustees for whoever was entitled to the estate, and consequently for the Plaintiff, if the title was in him. According to all the authorities, then, this allegation ought to have been met. Further, the denial of the representatives being in possession is quite consistent with the claim made in the bill to the rents and profits received by the two *Jane Hardmans*, and not applied by them. There is no averment in the plea that all those rents and profits were applied to the purposes of the trust; and, therefore, the second plea only goes to restrict the amount of the claim, and not to cut it altogether down.

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Then neither of the pleas meets the statement touching the documents and writings charged to be in the possession of the Defendants, and also charged as proving, not only generally the several matters in the bill, but more particularly as shewing that the two *Jane Hardmans* obtained possession of the estate under the term upon the trusts of that term. It was said that, upon the authority of *M'Gregor v. The East India Company* (a), it was unnecessary to deny this allegation as to writings, and that his Honor was of an opinion in that case different from his ruling in this. It appears, however, not only that the two cases are reconcilable, but that *M'Gregor v. The East India Company* materially supports the present decision; for his Honor there held that a plea of the Statute of Limitations needs not deny the possession of documents, when that possession would be immaterial from there being no allegation that these documents would shew any thing which
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(a) 2 Sim. 452.

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negated the matter of the plea, that is, a promise within six years; and upon looking to the bill, we find it only alleged in the usual way, when a mere general charge is made as to such writings, that "from the documents the several matters aforesaid, or some of them, would appear." But here the averment is specific, that something would appear inconsistent with at least one of the pleas — that of adverse possession since the nephew's death in 1759; for *Jane Hardman* the widow only died in 1795, according to the statement of the bill. Consequently, on the authority of *M'Gregor v. The East India Company*, as well as of *James v. Sadgrove* (a) and other cases, it ought clearly to have been denied that there were such writings in the possession of the Defendant.

The cases of *Sanders v. King* (b), and *Thring v. Edgar* (c), decided by the Master of the Rolls upon similar principles, do not appear to me in the least inconsistent with the present determination. In the former, it was held that when, besides setting forth his title, the plaintiff alleges circumstances as evidence of that title, a plea negating the title does not protect the party from answering as to those circumstances, being nearly the doctrine laid down in two of the cases which I have cited before; and in *Thring v. Edgar* it was held that when the defendant, in the answer accompanying a negative plea, goes beyond denying the facts specially charged as evidence of the plaintiff's title, he over-rules his plea. But it is not at all inconsistent with this, to hold that where facts have been charged inconsistent with the plea itself, negating that negative plea by anticipation as it were, and thus supporting the plaintiff's title, the traversing those averments, and thereby sup-
 porting

(a) 1 S. & Stu. 4.

(b) 6 Mad. 61.

(c) 2 S. & Stu. 274.

porting the plea, is safe, and does not over-rule the plea. This would be sufficient to shew that *Thring v. Edgar* is consistent with the present decision; but the other cases which I have referred to shew not only that so answering does not over-rule the plea, but that without such denials the plea itself is bad. Indeed, strictly speaking, the one proposition is involved in the other.

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The pleas having been over-ruled, the Defendant *Ellames* put in his answer. The answer commenced by setting out the Defendant's own title: for that purpose it stated four several fines *sur comusance de droit come ceo*, &c. levied of the estates in question in the cause; and it also stated the effect of the several deeds declaring the uses of the fines. The statement concluded in these words, "as by the said several fines, and the proclamations made thereon respectively now remaining of record in the said Court, and by the said several deeds hereinbefore mentioned, to which, for greater certainty, the Defendant craves leave to refer when produced, will appear."

These deeds were, with a number of others, enumerated in the third schedule to the answer, which admitted that all the deeds and documents mentioned in the schedule were in the Defendant's possession.

In a subsequent and distinct part of the answer directed to the case set up by the bill, the Defendant denied that the said fines, or any of them, were or was declared to enure to any uses under which the Plaintiff, as heir-at-law of the testator, supposing him to be such heir-at-law, was entitled to a moiety of the estates, or any other part

ROLLS.
Dec. 22, 23, 24.
Before the
Lords
Commissioners.
1835.
May 2, 3. 9.

If a Defendant in his answer states the effect of documents admitted to be in his possession, but for his greater certainty craves leave to refer to the documents themselves when produced, the Plaintiff is entitled to an order for their production, although the answer positively states that they form part of the Defendant's title, and in no way assist or make out the title of the Plaintiff.

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thereof; and he further denied that the said documents and writings, or any of them, or any documents which were then or had been in his possession or power, or which he had then or ever had access to, did contain recitals or references shewing the truth of the several matters in the bill mentioned, or any of them, save in so far as the same were thereinbefore admitted to be true, or particularly shewing the truth of the several matters in the said bill stated as to the said Plaintiff's pedigree, or any of them; and he further said, that the said documents related to and made out his the Defendant's title to the estates and premises so purchased by him as aforesaid, and did not, according to the best of the information and belief of the Defendant, shew or tend to shew any title in the said Plaintiff thereto, or to any part thereof.

A motion was now made that the Defendant *Ellanes* might produce and leave with his clerk in Court, for the Plaintiff's inspection, the several deeds before mentioned, declaring the uses of the aforesaid fines respectively.

Mr. *Pemberton* and Mr. *Jacob*, for the motion, relied upon the passage in the answer referring for the Defendant's greater certainty to the said several deeds when produced. That reference had the effect of making the instruments in question substantially a part of the answer by incorporating them with it, and the Plaintiff was of course entitled to see the whole of the answer; *Evans v. Richard* (a), *Atkyns v. Wright* (b), *Marsk v. Sibbald*. (c) The mere denial by the Defendant of the Plaintiff's title could be no ground for refusing the

(a) 1 *Sims.* 7.

(b) 14 *Fes.* 211.

(c) 2 *F. & B.* 375.

the production: *Evans v. Richard, Unsworth v. Woodcock.* (a)

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Mr. *Bickersteth*, Mr. *Kindersley*, and Mr. *Booth*, *contra*, contended that as the Plaintiff claimed by a paramount title as the right heir of the testator, while the Defendant, on the contrary, alleged that two other persons were the heirs, and claimed under them; and as the deeds in question were expressly sworn to constitute the Defendant's title, and in no way tended to make out or support the title of the Plaintiff, no ground was laid on which an order for production could be justified; *Lady Shaftesbury v. Arrowsmith* (b), *Bolton v. Corporation of Liverpool.* (c) In the latter of these cases, as appeared from the report, the very reference to the documents when produced, upon which reliance was now placed in support of the present application, was to be found in the Defendant's answer; but, although the motion had been most strenuously argued, it never occurred to any of the counsel employed in the cause that a reference of that description (which was a mere form thrown in as of course by every draftsman), could furnish even a plausible argument for claiming a production.

The MASTER of the ROLLS * made an order granting the application, on the ground that the Defendant, having by the words of reference incorporated the deeds in question with his answer so as to form a substantial part of it, the Plaintiff was entitled to see every part of that answer.

Dec. 24.

An

(a) 3 *Mad.* 452.

(b) 4 *Ves.* 66.

(c) 3 *Sim.* 467; and 1 *Mylne & Keen*, 88.

* *Sir C. Pepys.*

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May 2, 3.

An appeal motion was now made before Sir L. Stowell and Mr. Justice Bosanquet, sitting as Lords Commissioners of the Great Seal, against the order of the Master of the Rolls.

Mr. Kindersley, Mr. Wigram, and Mr. Benth, for the appeal.

The general rule is indisputable, that a plaintiff has no right to require the production of any document, admitted to be in the defendant's hands, which would afford discovery of any thing but that which may assist in making out his own title. To justify an order for production, the Plaintiff must shew, if not an exclusive, at all events a common interest in the instruments sought to be produced. This rule, originally established upon demurrer, has been since acted upon under every variety of circumstances, and in every stage of proceedings, and has now become imperative and unalterable. *Ivy v. Kekewich* (a), *Glegg v. Legh* (b), *Wilson v. Forster* (c), *Lady Shaftesbury v. Arrowsmith* (d), *Baden v. Dove* (e), *Barton v. Neville* (g), *Sampson v. Saxettenham* (k), *Firkins v. Lowe* (i), *Tamlinson v. Lymer* (k), *Tyler v. Drayton* (j), *Bolton v. Corporation of Liverpool* (m). Now, although the documents of which production is here sought are admitted to be in the Defendant's possession, the Defendant has taken upon himself positively to swear (and his oath for this purpose must be conclusive) that they constitute his own title, and in no way tend to assist or make out the title of the Plaintiff.

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(a) 2 Ves. jun. 679. *

(b) 4 Mad. 193.

(c) 1 Young, 280.

(d) 4 Ves. 66.

(e) 2 Ves. sen. 445.

(g) 2 Cox, 242.

(h) 5 Mad. 16.

(i) 1 Mad. 73 & 15 Price, 125.

(k) 2 Sim. 489.

(l) 2 Sim. & Sta. 309.

(m) 3 Sim. 467. and 1 Mylne

& Keen, 85.

It is impossible, therefore, to maintain the order under appeal, unless it is to be held according to the argument of the other side, and upon which the Court below seems to have proceeded, that the passage in the answer following the general statement of the effect of the deeds, and referring for the Defendant's greater certainty to the instruments themselves when produced, of itself entitles the Plaintiff to their production, independently altogether of the question how far he may have any interest in them, and even although they may be the very title deeds on which the defence is rested. Such a proposition is equally opposed to principle, and unsupported by authority. The words of reference occur, not in that part of the answer which is addressed to the interrogatories founded upon the case made by the Plaintiff's bill, but in a subsequent and totally distinct part, where the Defendant is setting out his own title, and stating these documents as forming an integral part of it. They are, moreover, the mere common form thrown in by the draftsman as of course whenever there is occasion to specify or refer to instruments upon which the party means to rely at the hearing; and they are obviously inserted, not for the purpose of informing the Plaintiff that he may call for a production to which he would not be entitled otherwise, but solely for the protection of the Defendant himself, to guard him against being prejudiced, should it afterwards appear that he has through ignorance or inadvertence stated the effect of the documents incorrectly. That such is their sole object and effect was expressly stated by Lord *Lyndhurst* in the very recent case of *Sparke v. Montriau* (a) in the Exchequer; a case from which it is clearly to be collected that the mere circumstance of a defendant incorporating a deed

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(a) 1 *Younge & Collyer*, 108.

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in his answer, either by referring to it as specified in a schedule annexed, or by referring to it for greater certainty when produced (and the answer there as here contained both species of reference), is no ground for compelling its production, if in other respects such compulsion would be inequitable. *Sparke v. Montriau* is, therefore, an express authority against the present order.

The cases upon which the order is attempted to be supported do not, when closely examined, bear out the proposition they are cited to establish. In *Atkyns v. Wright* the language ascribed to Lord *Eldon* appears somewhat equivocal; but the judgment shews plainly that his Lordship never conceived that the statement of the deeds and an admission that they were in the Defendant's possession, coupled with a reference to them in the common form for greater certainty when produced, constituted of themselves an absolute ground for ordering their production; for though all these circumstances concurred in that case, his Lordship refused the application. So in *The Princess of Wales v. The Earl of Liverpool* (a), Lord *Eldon*, after observing upon Lord *Talbot's* decision in *Bettison v. Farrington*, where the production of a deed was ordered simply on the ground that it was referred to in the answer, says that the "later decisions seem to have established that it is not the mere reference that makes the documents part of the answer for the purpose of production." (b) And this may be considered as Lord *Eldon's* deliberate statement of what was the practice in his time.

In *Bolton v. The Corporation of Liverpool*, where the documents were referred to when produced nearly in the

same

(a) 1 *Swans*. 114.

(b) p. 121.

same terms as are used here, and they were also stated in a schedule to be taken as part of the answer, every argument which ingenuity could suggest was resorted to for the purpose of obtaining the desired production; but it never occurred to the Plaintiff's counsel (of whom the present Master of the Rolls was the leader) that any plausible reason in favour of the motion could be founded on the language of the reference. If the rule now contended for be established, that a reference of this description to deeds in a defendant's custody of itself gives the plaintiff an absolute right to inspect them, there is no case whatever in which production may not be obtained; for a plaintiff has only to amend his bill by inserting a charge that the defendant has deeds in his custody forming part of his title, and on which he means to rely as part of his case at the hearing, and the admission in the answer extorted by the corresponding interrogatory will be a ground for enforcing the production. The monstrous consequences of such a practice are sufficiently apparent.

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Mr. Jacob and Mr. G. Richards, *contra*.

There are three cases in which the Court orders a defendant to produce for the plaintiff's inspection documents admitted by the answer to be in his possession; first, where the bill charges and the answer admits that the Plaintiff either solely or jointly has an interest in the documents; secondly, with a view to discovery, where they are or may be material to support the case made by the bill; and thirdly, where, as in the present case, they are by a special reference incorporated with the answer so as to form substantially a part of it. A reference of this kind at once puts an end to any question whether the documents sought do or do not constitute the defendant's title; for by taking upon himself to
state

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state the effect of them in his answer, and referring to them for greater certainty when produced, the defendant expressly waives any objection to their production founded upon that circumstance; he does what amounts to exactly the same thing as if he had set them out *in hæc verba*. He reserves to himself, notwithstanding the brief statement he gives of them, the right to have the full benefit of every part of them at the hearing; and if he is to have the benefit of such a reservation, so in common fairness must the plaintiff. The Plaintiff, therefore, who is entitled to see his adversary's whole case fully stated upon the pleadings, has a right to have the documents on which the Defendant means to rely set out at large, or, what is the same thing, to have them produced for his inspection.

The object of this appeal is really to ask that so many pages of the answer may be sealed up or struck out. It is incorrect to say that the words of special reference here used are mere words of course; so far from it, every experienced draftsman takes care to insert them only where there can be no objection either to produce the documents themselves, or to set them out at large if required; and the order under appeal is in strict conformity not only with the language and practice of the earlier Judges, but with the authority of Lord Eldon himself. In *Herbert v. The Dean and Chapter of Westminster* (a), Lord Macclesfield, upon the motion that the plaintiffs should produce vestry books before a Master, observes, "Since they in their answer to the cross bill refer thereto, and by that means make them part of their answer, referring to them as it is said for fear of a mistake, for that reason the Court ought to let the defendants see them; otherwise there would be no relying upon the answer

(a) 1 P. Wms. 773.

answer of those who are thus guarding themselves by references for fear of a mistake, and to avoid exceptions to their answer." So in *Bettison v. Farrington*, Lord Chancellor Talbot ordered the production of recovery deeds, by which the estate of the plaintiff as a remainderman in trust was barred, on the ground that the defendants, who claimed under those deeds, had, by "referring to them in their answer, made them part thereof." In *Evans v. Richard* (a), Lord Eldon expressly laid down and acted upon the same principle; which indeed he had previously recognised in *Atkyns v. Wright* (b) and *Marsh v. Sibbald*. (c) In *The Princess of Wales's* case the bill stated the documents, and referred to them, but did not say that they were in the plaintiff's possession; and the observation of Lord Eldon, relied upon by the other side, is addressed to that difficulty, a reference to documents when produced, as his Lordship stated the modern practice, not amounting to an admission that they are in the possession of the party. *Aston v. Lord Exeter* (d), *Hylton v. Morgan*. (e) The case of *Sparkes v. Montrieu* in the Exchequer was very peculiar in its circumstances; and the order, which is singularly framed, could not have been made, consistently with the practice, in this Court. In *Bolton v. The Corporation of Liverpool* the question was not raised, the argument having apparently been overlooked.

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Mr. Kindersley, in reply, observed that when the reports spoke of deeds "referred to" by the answer, the expression meant no more than "mentioned" or "stated," and did not apply to the special reference to them when produced, upon which the present motion

was

(a) 1 Swans. 7.

(b) 14 Ves. 211.

(c) 2 Ves. & B. 375.

(d) 6 Ves. 288.

(e) 6 Ves. 293.

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was grounded; *Sampson v. Swettenham*. (a) Nobody had heretofore imagined that a reference of that description, which, notwithstanding what had been urged, was certainly thrown in by the draftsman as a mere phrase of course, could give the Plaintiff a right to a production which the Defendant would otherwise have been entitled to withhold; and there could not be a doubt that if a search were made in the proper office, it would be found on examining the pleadings that in every one of the cases in which production had been refused, similar words to those now relied on were introduced in the answers. (b)

LORD

(a) 5 *Mad.* 16.

(b) The following paper was afterwards handed in to the Court, as the result of a search directed by the Lords Commissioners, as to the form of words of reference in answers:—

Evans v. Richard, 1 *Swanst.* 7.

Defendant saith, that in the schedule marked C. to this his answer annexed, which he prays may be taken as part thereof, he hath set forth a full and true list or schedule of all and every books, letters, copies of letters, &c. relating to the matters, &c. which now or ever were, &c. in the possession, &c. of defendant.

There is a submission as to whether books in daily use should be produced, but not as to the letters, &c.

After setting out the letters there are the following general words, "Defendant, for his greater certainty as to the purport and effect thereof, craves leave to

refer to the same when produced," &c.

Sampson v. Swettenham,
 5 *Mad.* 16.

Indentures fully abstracted.

General words at conclusion of stating deeds, "as in and by the said indentures when produced, &c. will appear;" and, "as by reference thereunto had will appear."

An admission "of custody and possession, &c. set forth in the schedule to answer annexed, and which defendants pray may be taken as part thereof."

There does not appear to be any submission to the Court, as to whether deeds ought to be produced, &c.

Tylerv. Drayton, 2 *Sim. & Stu.* 309.

Indentures fully set out, shewing title, &c.

General words at conclusion,—
 "craves leave to refer when produced," &c.; but no prayer that they

LORD COMMISSIONER SHADWELL delivered the judgment of the Court.

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ELLAMES.
May 9.

The object of the present application is to discharge an order made by the Master of the Rolls upon the Defendant for the production of certain indentures admitted by the Defendant to be in his possession. The Defendant has by his answer in part set forth the deeds in question, which are comprised in a schedule annexed to the answer, as being documents in his possession, and he has for greater certainty craved leave to refer to the indentures themselves when produced. If by so doing the Defendant has made the indentures a part of his answer, it seems to follow as a necessary consequence that the Plaintiff, having a right to read the whole of the Defendant's answer, has a right to read the documents so made a part of his answer.

The question which arises in this case has been involved in some confusion on account of its having been mixed up with questions of a different kind. There are three cases which may arise; the documents may not be referred to, but they may be admitted to be in the Defendant's possession; they may be referred to, and not admitted to be in the Defendant's possession; or they may be in part set forth or shortly stated in the

they may be taken as part of answer.

Admission of custody, and possession, and schedule.

Defendant submits he ought not to produce, &c.

Marsh v. Sibbald, 2 Ves. & B. 375.

Cannot be found.

Roper v. Roper, before the Vice-Chancellor, afterwards affirmed on appeal, and in which production was refused: the defendants referred to the instruments in the usual way.

Bolton v. The Corporation of Liverpool, 3 Sim. 467.

The same as the preceding case.

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the answer, and referred to, as in the present case, for the Defendant's greater certainty when produced.

Where the documents are not referred to, but are admitted to be in the Defendant's possession, there the question whether the Defendant shall produce them or not is determined by considering whether the documents do or do not relate to the title of the Plaintiff. If they relate solely to the title of the Defendant, in that case the order for production is not made; this appears from the case of *Bligh v. Berson* (a): on the other hand, if they are material to the Plaintiff's case, the Court will order their production, as in the case of *Firkins v. Lowe*. (b) In both of those cases the documents were admitted to be in the defendant's possession, and in neither of them were the documents so referred to as to be made part of the defendant's answer. In *Burton v. Neville* (c), where the plaintiff claimed under a settlement and the defendant under recoveries, and the defendant admitted the deeds to be in his possession, but did not submit to produce them, a motion for their production was refused, the Lord Chancellor observing that plaintiffs could only call for those papers in which they had shewn that they had a common interest with the defendant.

Secondly, in the case where the documents are referred to and not admitted to be in the defendant's possession, it is perfectly clear that the Court cannot order production unless it turns out that the documents stated not to be in the possession of the defendant happen to be in the hands of some person over whom the Defendant evidently has control. Thus, in the case of *Darwin v. Clarke* (d), where the answer ad-

mitted

(a) 7 Price, 205.

(c) 2 Cox, 242.

(b) 13 Price, 193.

(d) 8 Ves. 158.

mitted the execution of an instrument, but did not admit it to be in the Defendant's possession, custody, or power, the motion for production was refused.

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A third class of cases is where the contents of instruments are in part stated in the answer, and referred to for greater certainty. In *Alkyns v. Wright* (a), a motion was made for the production of a document which appeared to be in the possession of the defendant *Graham*, and Lord *Eldon* was of opinion, under the particular circumstances of that case, that the plaintiff could not compel the production of the deed, but he observes that where a defendant had in a great measure set forth the contents of an instrument, and for the truth of what he set forth referred to the instrument, there was no question of production, as he made the instrument part of his answer. This appears from the case of *Herbert v. The Dean and Chapter of Westminster* (b), where Lord *Macclesfield* says, that "as to the motion that the plaintiffs should produce the vestry books before a master, since they in their answer to a cross bill refer thereto, and by that means make them part of their answer, referring to them (as it is said) for fear of a mistake; for that reason the Court ought to let the defendants see them." So in *Bettison v. Farrington* (c) Lord *Talbot* says, "the defendants, by referring to the deeds in their answer, have made them part thereof." There is a query in the note to that case, whether the bare referring to a deed without setting it forth in *hæc verba*, will make it part of the answer, and *Hodson v. The Earl of Warrington* in the same book is referred to; but I may take this opportunity of observing that the cases in the third volume of *Peere Williams* are not of equal authority with those in

(a) 14 Ves. 211.

(c) 3 P. Wms. 563.

(b) 1 P. Wms. 773.

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in the two preceding volumes which were published in his lifetime. In *Marsh v. Sibbald* (a) Lord *Eldon* says that every book, letter, memorandum, &c., referred to by the answer, is a part of the answer; and in *Evans v. Richard* (b) the same learned Judge says, that when the Court orders letters and papers to be produced, it proceeds upon the principle that those documents are by reference incorporated in the answer and become a part of it.

It appears therefore, upon a review of the cases, to be perfectly settled that where a defendant in his answer states a document shortly or partially, and for the sake of greater caution refers to the document in order to shew that the effect of the document has been accurately stated, in such a case the Court will order the document to be produced. It was said, in the present case, that the document ought not to be produced, because it only manifests the Defendant's title; but the answer to that is, in the first place, that it may by possibility do something more than merely manifest the Defendant's title. It would be a strange thing to say that the Defendant should at the hearing have the advantage of other parts of the deed than those set forth in the answer, and that the Plaintiff, who looks to the answer for information, should not be at liberty to avail himself of a knowledge of the deed. It seems to be consistent with justice, that if the Defendant makes a document a part of his answer, the Plaintiff is entitled to know what that document is, because he has a right, at the hearing, to read such parts of the Defendant's answer as he thinks fit. It is to be observed, also, that if the Plaintiff should think proper to amend his bill, and require the deed to be set forth at length, it would be a matter of course that the deed should be so set forth.

(a) 2 Ves. & B. 375.

(b) 1 Swanst. 7.

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GOODMAN v. EDWARDS.

1833.
ROLLS.
Nov. 21.

SAMUEL GOODMAN, by his will duly attested to pass real estate, gave and devised all those his two several messuages, cottages, or tenements, with the outbuildings, yards, gardens, orchards and appurtenances thereto belonging, situate, and being in *Everdon* in the county of *Northampton*, and also all his messuage, tenement, or dwelling-house, with the outbuildings, yard, gardens, orchards, and appurtenances thereto belonging, and also all his several closes or inclosed ground of arable and pasture land, containing by estimation 100 acres or thereabouts, were the same more or less, situate and being at *Everdon* aforesaid, unto and to the use of his wife, then *Mary Goodman*, and afterwards the wife of the Defendant *John Edwards*, and her assigns during the term of her natural life, provided she should so long continue the testator's widow, but not otherwise; and from or immediately after her decease or second marriage, he gave and devised all the said hereditaments and real estates unto, and to the use of his nephew, the Plaintiff, and his heirs for ever, subject to the mortgage debt or debts then due from the testator and secured thereon; and the testator declared it to be his will and desire, that no part of his personal estate should be applied to pay off any part of the principal or interest, then or thereafter to become due in respect of such mortgage debt or debts.

If upon the whole will it plainly appear that the testator meant to pass leasehold property under the description of real estate, the Court will give effect to his intention.

The testator, after giving several pecuniary legacies, bequeathed the residue of his personal estate to his wife, *Mary Goodman*; and he appointed his wife and two other persons his executors.

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v.
EDWARDS.

Of the 100 acres mentioned in the testator's will, forty acres were leasehold, held under the college of *Eton*; and the question in the cause was, whether upon the intermarriage of *Mary Goodman* with the Defendant *Edwards*, those forty acres passed under the devise over to the nephew, or, under the residuary gift of the testator's personal estate, to the Defendant *Mary Edwards*.

Mr. *Pemberton* and Mr. *W. C. L. Keene*, for the Plaintiff.

If it be the clear intention of the testator to include the leasehold with the freehold in the gift of the 100 acres, that intention will prevail, although, in describing and disposing of the 100 acres, he has used words which are applicable only to real estate; *Hobson v. Blackburn*. (a) It is not disputed, that of the 100 acres mentioned in the will, forty acres consist of land held under a renewable lease from the college of *Eton*. That fact is of itself sufficient to shew that the testator intended to include the leasehold with the freehold, and the case, therefore, resolves into one of mistaken description. The leasehold part of these 100 acres has been long united in occupation and enjoyment with the freehold part, and would pass, according to all the authorities, under a limitation in its nature applicable only to freehold property, even if the testator's intention were less clearly indicated than it is in the present case, and if the inference of intention were not strengthened, as it is here, by the great probability that the testator considered the property which he held under the college to be real estate.

Mr.

(a) 1 *Mylne & Keen*, 571.

Mr. *Bickersteth* and Mr. *Crombie*, *contra*.

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GOODMAN
v.
EDWARDS.

The present case falls within the rule established ever since the case of *Rose v. Bartlett* (a) that a devise of lands, tenements, and hereditaments, where the testator has both freeholds and leaseholds in the same place, will not pass the leaseholds. All the testator devised to his nephew was "his said hereditaments and real estates subject to the mortgage debt due from the testator and secured thereon," and the freehold part of the 100 acres was the property upon which alone the mortgage debt was secured. The words "said hereditaments and real estates" must be referred to the 100 acres mentioned in the previous devise, so far only as those 100 acres are capable of answering the description of real estate. There is another circumstance which strengthens the conclusion that the testator did not mean to devise the college lease to his nephew, and that is the condition on which the lease was granted. The testator, two years before the date of his will, obtained a renewal of the lease for a term of twenty years, and one of the provisoes in the lease was that the testator should not alienate it otherwise than by will to his widow and children.

Mr. *G. Richards*, for an incumbrancer.

The MASTER of the ROLLS.

Upon the whole will it is plain that the testator meant to comprise the forty acres of leasehold under the description of real estate. It was held under a renewable lease from a college, and had been long in his family and united in occupation with the freehold land. After devising the 100 acres of land, there follow the words
"all

(a) *Cro. Car.* 292.

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"all the said' hereditaments and real estates," clearly indicating that he considered the whole 100 acres to be part of his real estate, and this misconception of the nature of his property runs through all the subsequent expressions relating to it. The widow entered upon the 100 acres, as being devised to her for life, and the whole is expressly given over in case of her second marriage. It would be repugnant and contrary to the testator's express intention that she should take the leasehold under the description of general personal estate, not for life only but absolutely. I am of opinion therefore, that the Plaintiff is entitled to the forty acres of leasehold property, part of the 100 acres.

1833.



ANDERSON v. CAUNTER.

ROLLS.
Dec. 9.

THE bill was filed by the residuary legatees of the testator, *James Carnegy*, for the administration of his estate. The testator died in *Penang*, and his will had been proved there by the defendant *Caunter*, and *Clubley*, two of the executors named in the will, and his personal estate in *India* had been possessed by them. *Clubley* died, leaving his widow his executrix, who proved his will in *India*, and had possessed his assets there. Mrs. *Clubley* was at the time of the filing of the bill in *England*, and she was made a co-defendant in the suit. The bill charged that *Caunter* and *Clubley* had improperly employed the testator's estate in *India* in trade, and that considerable loss had been thereby sustained, and the bill sought to charge *Caunter* and the estate of *Clubley* with that loss. A personal representative of the estate of the testator *Carnegy* in *England* was a party to the suit, and the bill prayed a general account of the testator's estate.

A, one of the executors of the will of *B*., who died in *India*, proved the will, and possessed the testator's assets in *India*. The widow and executrix of *A*. proved her husband's will, and possessed his assets in *India*, and having afterwards come to *England*, she was made a party to a suit for the administration of *B*'s estate: Held, that it was not necessary that an administrator of *A*'s estate in *England* should be also a party to this suit.

On the opening of the case it was objected by Mr. *Rolfe* and Mr. *G. Richards* on the part of the Defendant *Caunter*, that a personal representative in *England* of *Clubley* ought also to be before the Court; and they cited *Jauncy v. Sealey* (a), *Logan v. Fairlie* (b), *Sandilands v. Innes*. (c)

Mr. *Pemberton*, *contra*, said that, in an action at law against an executor, all that was necessary was to prove that he had possessed the assets of the testator, and the Defendant

(a) 1 *Vern.* 397.

(b) 2 *Sim. & Stu.* 284.

(c) 3 *Sim.* 265.

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v.
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Defendant could only discharge himself by succeeding in a plea of *ne unques executor*, or *plene administravit*. It was not necessary at law to allege a probate, and it would be singular if a stricter rule should be insisted upon in a court of equity. There was no out-standing estate of the testator in this country, and no account was sought against *Chubley's* estate in this suit, except in so far as it was liable for the assets of the testator possessed by him in India.

The MASTER of the ROLLS over-ruled the objection, stating that, in the present suit, the estate of *Chubley* could not be administered, and that, according to the course of the Court, the decree against his executrix would not be for the general administration of his estate, but would only require from her an account of what she had received and paid as his executrix, and would charge her with the balance.

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ROLLS.
Dec. 15.

WHYTALL v. KAY.

THOMAS EWBANK by his will duly executed and attested so as to pass real estate, after specifically bequeathing to his wife his household furniture, and some other part of his personal estate, and after giving several legacies, devised and bequeathed all his real estate whatsoever, and all his personal estate not therein bequeathed, to trustees, &c. upon trust out of the personal estate to discharge all his just debts, funeral and testamentary expenses and legacies; and out of the income of the personal estate to pay to his sister, *Ann Whytall*, an annuity of 20*l.* for her life, and upon further trust to permit his wife, during her life, to occupy and enjoy his real estates, and to authorise her to receive and take to her own use the rents and profits thereof during her life; and, as to his remaining personal estate, after such payments and provisions thereout as aforesaid, upon trust to permit his wife to receive to her own use during her life, the yearly income and produce thereof; and upon further trust, as soon as conveniently might be after the decease of his wife, to sell and dispose of the whole of his real estate, and to get in and receive his personal estate, and to pay, apply, and dispose of the monies so arising from his real and personal estates, together with all rents, income, and produce thereof, respectively from and after the decease of his wife, to such person and persons whether by way of legacy, annuity, or otherwise, and for such purposes as he the testator by any codicil or codicils, testamentary schedule or schedules to his will should from time to time give, bequeath, direct, or appoint the same.

A testator cannot by a will duly executed, reserve to himself a power to charge his real estate for the payment of legacies, or for any other purpose, by an unattested codicil.

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The testator afterwards made a codicil which was attested by two witnesses only, and he thereby gave certain legacies and annuities out of his residuary personal estate, and the produce of his real estate directed to be sold by his will, and as to all the residue of his personal estate, and the monies arising from the sale of his real estate, after paying the legacies and annuities, he gave the same to his nephew, *Octavius Lesfe*.

The bill was filed by the widow and the co-heirs at law of the testator against the executors, the legatees named in the codicil, and the residuary legatee.

The question in the cause was, whether the will and codicil taken together would operate so as to charge his real estate with the payment of the legacies and annuities given by the codicil.

Mr. Pemberton, for the Plaintiffs.

The testator has directed a conversion of his real estate, for purposes to be thereafter declared by a codicil, or testamentary instrument; and as the codicil was not duly attested, the purposes fail, and the heir at law is entitled to the benefit of the failure. If a testator charge his real estate generally with the payment of debts and legacies, it is now undoubtedly settled, though it is difficult to reconcile the doctrine with principle, that such charge will extend to future debts, and to legacies given by an unattested codicil. The reason assigned for this doctrine is, that debts and legacies are of a fluctuating nature. "It is impossible," say Sir *W. Grant* in *Rose v. Cuninghame*(a) previously to ascertain what debts a man may owe at the time of his death; and it is difficult to ascertain, when he is making his formal and regular will, what legacies he may think it,

(a) 12 Ves. 37.

fit, or his fortune will enable him to give. The Court has therefore said that, when he has by a will duly executed, charged debts and legacies, it is only necessary to shew that there is a debt, or that there is a legacy in order to constitute a charge; for the moment that character is shewn to belong to the demand, you shew that it is already charged upon the estate. Then an unattested instrument is itself perfectly competent to give a legacy; and, when given, you predicate of it that it is a legacy; and then the charge immediately attaches by virtue of the executed will. But here the testator says he does not now determine that all annuities and all legacies he shall hereafter give, shall be charges; but only, that if at some future period he shall think proper to declare legacies and annuities to be charges upon his real estate, then the trustees shall pay them out of the real estate. Therefore, not only the legacy is to be found, but also the will of the testator to make it a charge upon his estate, without which it is not a charge. That is only an attempt to reserve by a will duly executed, a power to charge by a will not duly executed. It is the case of *Habergham v. Vincent*." (a) The distinction here taken by Sir *W. Grant*, is precisely applicable to the present case. The testator does not charge his real estate, or the produce of it with the payment of all legacies to be thereafter given, but he directs his trustees to pay the produce in such manner as he shall by any codicil or testamentary instrument direct; in other words, he reserves to himself a power of disposing of his property in a manner contrary to law.

Mr. *Jacob*, for the residuary legatee.

The testator has here indicated an intention to convert his real estate out and out into personalty, and to give

(a) 2 *Yes.* jun. 204.

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give the surplus of the mixed fund consisting of his personal estate and the real estate so converted into personalty, after payment of his debts and legacies, to his residuary legatee. If that intention is to be collected from the will, the residue will pass by an unattested codicil. In *Sheddon v. Goodrich* (a) this principle is recognised by Lord *Eldon*.

Mr. *Kindersley*, for a legatee named in the codicil, contended that the words of the will amounted to a general charge of legacies upon his real estate, and in that case the legacies given by the unattested codicil would be supported. It was true that real estate could not be converted into personalty by will so as to give validity to a direct disposition of it by an unattested codicil; but the testator had in this case charged whatever he had given or might thereafter give by way of legacy, in other words, all his legacies upon the produce of his real estate.

Mr. *Bickersteth* and Mr. *Wilbraham*, for the trustees.

The MASTER of the ROLLS.

With respect to the first point raised in this case, there can be no conversion out and out, unless it appears upon the will to have been the intention of the testator that the produce of his real estate should at his death have the same quality as personal estate. Much confusion and, as I think, error have been introduced into some of the cases in consequence of not attending to this simple principle. There is in this will nothing to indicate an intention, on the part of the testator, that the produce of his real estate should have all the qualities of personal estate.

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(a) 8 Ves. 491

As to the second point, it is now settled, though not upon a very satisfactory principle, that a testator may, by will duly executed, charge his real estate with the payment of all legacies, which will include future legacies given by an unattested codicil; thus placing debts and legacies upon the same footing; but he cannot by a will duly executed reserve to himself a power to charge his real estate, or the produce of his real estate, with legacies given by an unattested codicil. This plain distinction is expressed in the case of *Rose v. Cuninghame*; and the produce of the real estate in this case is, therefore, undisposed of, and descends to the Plaintiffs as the testator's co-heirs at law.

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LOMAS v. WRIGHT.

ROLLS.
Nov. 7, 8.
Dec. 9. 12.

BY a settlement dated the 9th of *October*, 1811, *Nathaniel Wright* conveyed and covenanted to surrender certain leasehold and copyhold estates to trustees, upon the trusts therein mentioned, for the benefit of *Mary Lomas*, with whom he cohabited, and of his four natural children by her, and also of any after-born child that *Mary Lomas* might have by him. The settlement contained a covenant on the part of *Nathaniel Wright*, for himself, his heirs, and executors, for the quiet enjoyment of the premises comprised in the settlement, as against himself and his legitimate son *John Wright*, and a covenant for further

Creditors by specialty, who are mere volunteers, are not entitled to compete with creditors on simple contract for valuable consideration, but as against the devisees of the debtor have a right to stand in the place of mortgagees who have ex-

assurance.

hausted the fund provided by the testator for the payment of debts.

Where by deed an estate was limited to an after-born illegitimate son in fee, and if he should die before he attained twenty-one, then in fee to a living illegitimate child, who died an infant, and an after-born illegitimate son attained the age of twenty-one, it was held that the last limitation failed, and that the devised estate resulted to the heir of the grantor.

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assurance. Some time after the date of the settlement, *Mary Lomas* had another child, of which *Nathaniel Wright* was the reputed father.

Nathaniel Wright by his will dated the 29th of Nov. 1817, after directing all his just debts, and the legacies thereafter given by him, to be paid out of his personal estate, gave, devised, and bequeathed to trustees, &c. all his personal estate, and a part of his real estates situate in the counties of *Chester* and *Lancaster* upon trust, in the first place to sell and dispose of such parts thereof as were saleable, and with the produce of sale to pay all his debts, including debts on mortgage, and his legacies thereafter given. He then gave a number of legacies, and directed his trustees to invest the residue of the produce of sale in the purchase of stock, to be applied to the purposes thereafter mentioned. The testator then devised certain estates in the county of *Leicester*, which were subject to mortgages, to his trustees, &c. upon trust for his only legitimate son *John Wright*, and his issue, in strict settlement, with remainders over. The testator then recited the settlement of the 9th of *October*, 1811, and proceeded as follows: — “Being satisfied that the said settlement is not consistent with, but contrary to the true intent and meaning of my marriage settlement, therefore I do expressly will, order, and direct, that my said son and his heirs shall and do, not only release all his and their right, title, and interests to and in the said leasehold and copyhold estates, but shall give such further assurance as may be necessary for the ratifying and confirming of the said settlement. And in case my said son or his heirs shall refuse to ratify the same, or commence or prosecute any suit or suits at law or in equity for or concerning the same, then my will is, that the 5000*l.* 3 per cent. consols, by me hereinafter directed to be paid to my said son, shall belong to the trustees of the

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the said settlement, in trust for the use and benefit of the persons named therein as of the third part. And I give and bequeath to my said son, 5000*l.* stock, to be hereafter invested in the 3 per cent. consolidated Bank annuities, to be paid to him from and out of the money to be invested in government securities, when he shall attain his age of twenty-one years, upon the express condition that he ratify and confirm the said settlement."

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The testator died on the 16th of *July*, 1818, and *John Wright* the son, upon his coming of age in 1827, refused to confirm the settlement. The original bill was filed by *Emma Lomas*, the survivor of the testator's four natural children mentioned in the settlement, and by the trustees of the settlement, against *John Wright*, *Peter Lomas*, the afterborn natural child, the trustees and executors under the will of the testator, and the Attorney-General, for the purpose of having it declared that the trusts of the settlement should be carried into execution, or, if not, that the Plaintiff, *Emma Lomas*, might be declared to be entitled to the benefit of the 5000*l.* 3 per cent. consols given by the will to *John Wright* upon the condition therein expressed. At the original hearing of the cause in *July* 1830, it was declared that the defendant *John Wright*, having elected to take the settled estate, had forfeited his right to the legacy of 5000*l.* 3 per cent. consols, and that the Plaintiffs, the trustees of the settlement, were entitled to that sum in trust for such of the illegitimate children of the testator as were born previously to the execution of the settlement.

The testator's personal estate was found to be insufficient for the payment of his debts, and at the hearing on further directions, a question was made whether the Plaintiffs were entitled to be considered

as

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as legatees or creditors, and whether they were entitled, in either character, to any and what satisfaction out of the estates devised to *John Wright* in respect of mortgages which had been paid out of the fund provided by the testator for the payment of debts.

For the Plaintiffs it was argued that if they were to be considered as legatees, they would be entitled, as against the devised estates, to stand in the place of the mortgagees of those estates to the extent to which the mortgage debts had been paid out of the testator's personal estate; *Forrester v. Leigh*. (a) But the question in which the Plaintiffs had a greater interest was, whether they were not entitled to be considered as creditors by reason of the covenant into which the testator had entered in the settlement. That was a covenant which the testator was incapable of performing, and which was in effect broken from the very moment it was entered into. It was true that the statute of fraudulent devises (b) gave no remedy against the devisee of a debtor except in the form of an action of debt; *Wilson v. Knubley* (c); and the remedy had only been extended to covenants by a recent act. (d) But in this case the testator had himself fixed and ascertained the damages for breach of the covenant at the sum of 5000*l.* three per cent. consols. If the Court should be of opinion that the Plaintiffs were entitled, by reason of the breach of covenant, to be considered as creditors, but that the damages were not ascertained by the testator, an inquiry before the Master would be necessary to ascertain the amount of the damages. Where a covenant was broken, though the damages were unliquidated, the covenantee was a specialty creditor, and it had been held that even an administrator could not retain

(a) *Amb.* 171.(b) 3 *W. & M.* c. 14.(c) 7 *East*, 128.(d) 1 *W. 4.* c. 47.

tain his own simple contract debt against such a creditor : *Musson v. May*. (a) But it must be admitted that the persons beneficially entitled under the settlement could claim only as volunteers, and were not entitled to compete even with simple contract creditors for valuable consideration. They were voluntary creditors occupying a middle station inferior to creditors for value of the lowest class, and superior to legatees. *Sneed v. Culpepper* (b) was a case which shewed the extent to which the Court would support a voluntary settlement made in favour of children ; and the natural obligation a man was under to provide for his children, upon which the Court insisted in that case, was equal, whether the children were legitimate or illegitimate. In that case, S. having several children, and being much in debt, conveyed part of his lands in trust for payment of his debts ; and by another deed, conveyed other part to trustees for the maintenance of his children. This last conveyance being voluntary was declared void as to creditors, but good against S. himself ; and therefore, it was held, that if his creditors should fall upon those lands for a satisfaction of their debts, and thereby strip the children of their maintenance, the children should have a recompence out of the residue of the estate which S. had reserved to himself for his own maintenance ; and the Court compared it to the case where creditors, that have a lien upon the land, take their satisfaction out of the personal estate which was liable to other creditors of an inferior nature, who have no lien upon the land ; these creditors in equity shall stand in the place of the other creditors who had a lien upon the land, and have a satisfaction out of that in their stead. This case was the same, for though the conveyance was voluntary in the

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(a) 3 V. & B. 194.

(b) 2 Eq. Ca. Abr. 255.

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the father, yet he was bound by nature to provide for his children, and it was a sort of debt.

On the other side it was contended, that the gift of the 5000*l.* three per cent. consols was not a general pecuniary legacy; that it was given separately and distinctly from the legacies enumerated, as such, in the testator's will, and must be taken to be a gift payable out of the surplus, if any, of the produce of the property directed to be sold for the payment of the debts and legacies thereafter enumerated, which did not include the gift in question. There being no surplus of the produce of the property directed to be sold, the gift of the 5000*l.* which was to be paid out of that specific fund and no other, wholly failed. Neither was there any debt or breach of covenant at the death of the testator, in respect of which the Plaintiffs could claim as creditors; for the trustees were actually in possession of the estates, and applied the rents and profits to the trusts of the will from the year 1818, when the testator died, until 1827, when *John Wright* came of age, and entered, as he was entitled to do, upon the settled estates, without, however, calling for past rents, or in any manner disturbing what had been previously done by the trustees. To argue that a covenant for quiet enjoyment, which enjoyment was not actually disturbed until nine years after the death of the covenantor, was broken at the very moment it was entered into, was a subtlety which could not prevail for any purpose in that Court, much less for the purpose of assisting volunteers.

Mr. *Bickersteth* and Mr. *Lovat*, for the Plaintiffs.

Mr. *Tinney*, Mr. *Kindersley*, Mr. *Wigram*, and Mr. *Duckworth*, for several Defendants.

Mr.

Mr. *Wray*, for the Crown, which claimed the interests of the deceased illegitimate children.

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It is unnecessary to consider the questions which were raised on the supposition that the Plaintiffs were entitled to claim as legatees; because I am of opinion that, under the covenants contained in the settlement, the Plaintiffs are to be considered as creditors. The Plaintiffs, however, being volunteers, are not entitled to compete with creditors, even on simple contract, for valuable consideration; but, as against the devisees of the testator, they are entitled to stand in the place of the mortgagees who have been satisfied out of the fund provided for the payment of debts. And let it be referred to the Master to inquire into the amount of the damage sustained by their eviction from the estate.

Dec. 12.

Another question was afterwards raised in this case. The testator, by the settlement made in favour of his natural children, limited certain estates to the use, intent, and purpose that, in case *Mary Lomas* should happen to have another child by him, *Nathaniel Wright*, then that such after-born child should out of the said premises have, receive, and take during his natural life an annual rent or sum of 25*l.*, and subject to such charge, and certain other charges therein mentioned, to the use of *Henry Lomas*, his heirs and assigns for ever; but in case *Henry Lomas* should happen to die under age, and without issue, then, subject as aforesaid, to the use of such after-born child as aforesaid, if a son, his heirs and assigns for ever; but in case there should be no after-born son as aforesaid, or in case there should be one and he should die under age and without issue, then,

Where by deed an estate was limited to an after-born illegitimate son in fee, and if he should die before he attained twenty-one, then in fee to a living illegitimate child, who died an infant, and an after-born illegitimate son attained the age of twenty-one, it was held that the last limitation failed, and that the devised estate resulted to the heir of the grantor.

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subject and charged as aforesaid, to the use of *Oller Lomas*, his heirs and assigns for ever. *Henry Lomas* and *Oller Lomas* both died under age, and without issue; *Peter Lomas*, the after-born son, attained his age of twenty-one; and the question was, whether the executory devise over was void, being dependent on the death of a devisee incapable of taking, or whether it was accelerated by reason of the incapacity of that devisee.

Mr. *Wray* for the Crown, which represented the interest of *Oller Lomas*.

It was decided in *Blodwell v. Edwards* (a), that a limitation to a bastard, before he be born, is bad; "for the law hath not any expectancy that any such should be, nor will give liberty or scope to provide for such before they be." The limitation to the after-born illegitimate child, therefore, in the present case being void, the next limitation takes effect as if the prior one were entirely struck out of the deed. In *Carrick v. Errington* (b), it is laid down that if lands be limited to *A.* for life, remainder to *B.*, a papist, for life, remainder to *C.*, a protestant, and *A.* dies, in such case the remainder to *B.*, the papist, being void, the next remainder to *C.* shall take effect presently, in the same manner as if a remainder were limited to a monk for life, or to one who refuses to take, or if such remainder-man were dead, and there had never been such limitation.

Mr. *Tinney* and Mr. *Kindersley*, *contra*.

In *Carrick v. Errington*, where there was a remainder in a settlement to *A.*, a papist, for life, remainder to trustees to preserve contingent remainders during the life of *A.*,
 remainder

(a) *Cro. Eliz.* 509.

(b) 2 *P. Wms.* 361.

remainder to *A.*'s first and other sons, remainder to *B.*, a protestant, for life; and the question was, whether the heir at law of the grantor, or the remainder-man *B.* should take the profits during the life of the papist, the point actually decided was, not that the remainder of *B.* was accelerated, which would undoubtedly have supported the argument on the other side, but that the heir at law of the grantor should take the estate so long as the same was undisposed of. The Lord Chancellor expressly said that the next protestant remainder-man was not to be let in before his time, so as to prejudice or endanger a third person, the son or sons of the papist. In *Robinson v. Hardcastle (a)*, the very point was raised whether, where the first use is illegal, it shall defeat the limitations over, or accelerate their coming into possession; and the Court of King's Bench, to which a case was sent, was of opinion that a void use does not accelerate the limitations over. Mr. J. *Buller*, upon the argument of that case, observed that if a subsequent limitation depended upon a prior estate, which was void, the subsequent one must fall together with it; but if the subsequent limitation did not depend upon the other, it might then take place notwithstanding the first was bad. Here the subsequent limitation is wholly dependent upon that which precedes it, inasmuch as it was to take effect upon a contingency which was to happen to the person intended to take under the prior limitation. The remainder over was to take effect in the event of an after-born illegitimate child dying under twenty-one, and as an after-born illegitimate child has attained twenty-one, the remainder over is absolutely void, and the gift will result to the heir of the grantor.

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Wassart.

Mr.

(a) 2 Bro. C. C. 22. 344. and 2 T. R. 241.

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Mr. Wray, in reply.

Where a limitation is simply void, the person next entitled in remainder will be let in. Thus, where there is a limitation to a monk for life, with remainder over, the estate will not result to the grantor during the life of the monk, but the next limitation will take effect; for a monk is for all civil purposes dead; *Thorndy v. Fleetwood*. (a) It is impossible, for the purposes of this argument, to distinguish the case of an illegitimate child not *in esse* from that of a monk; the law deems the monk to be a person *civiliter mortuus*, and it will not recognise the possible birth of a bastard, for, according to *Blodwell v. Edwards* (b), it hath no expectancy of such an event. Whatever the fact may be, therefore, as to an after-born illegitimate child who attained twenty-one, the Court cannot recognise the existence of such a person, but will let in *Oller Lomas* as if there had been no prior limitation in the settlement. In *Carrick v. Errington*, the trustees to preserve contingent remainders were the persons next in remainder after the void limitation to the papist, and they were entitled to hold the estates during the life of the papist, whether he had issue or not. That case, therefore, is no exception to the rule contended for on the part of the Crown.

The MASTER of the ROLLS.

If in a grant or devise there be a limitation in fee which is wholly void, no estate passes, and the use remains in the grantor, or results to the heir of the testator. So, if the void limitation be not of the fee, but of a partial interest only as an estate for life, the use of such partial interest in like manner remains in the

(a) 1 *Str.* 318.

(b) *Cro. Eliz.* 509.

the grantor, or results to the heir of the testator. The use in this case to the after-born child in fee, resulted to the grantor, and the subsequent gift to *Oller Lomas* being to take effect only in case the after-born child died before he attained twenty-one, and such after-born child having in fact attained twenty-one, the limitation to *Oller Lomas* could never take effect, and the Crown, standing in his place, can have no claim. The heir of the grantor is, therefore, entitled to the estate limited to the after-born son, and his heirs.

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There is a case in the books which, at first sight, seems to militate against the principle which I have stated. If there be a devise to a monk for life, with remainder over, it has been held that the devise to the monk is void, and the remainder over takes effect upon the death of the testator. The reason given for that decision is, that a monk is *civiliter mortuus*, and that the effect is the same as if the devise had been to a person who had died in the lifetime of the testator; that reason has no application here, and is, indeed, somewhat quaint. It appears by reference to the Registrar's book, that the point in *Carrick v. Errington* was not ultimately decided, the settlement on which it depended being, on the hearing of the cause upon further directions, declared to be fraudulent and void.

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A. assigned a fund to trustees, upon trust to pay the interest to *B.* for his life, and after his decease to pay, transfer, and assign the same among *B.*'s children, and if no child of *B.*, from and immediately after the decease of *B.* upon trust to pay, transfer, and assign the same as *A.* should appoint, and in default of appointment, to pay transfer, and assign the same to such person or persons as should at the time of the decease of *A.* be *A.*'s next of kin. *A.* died in the lifetime of *B.* without

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IN this case (see p. 82. *suprà*), the Plaintiffs appealed from the decision of the Master of the Rolls on the first point; and the Defendants appealed from his Honor's decision on the second point. It was agreed that the two appeals should be considered and argued, as if they were a single appeal from the whole decree.

Mr. *Wigram* and Mr. *Campbell*, for the Plaintiffs.

In the first place, we contend that *Alexander Elmsley* was excluded, by the terms of the settlement, from taking under the ultimate limitation to the settlor's next of kin. In *Holloway v. Holloway* (*a*), it was held that the tenant for life of a fund, who was also one of the testator's co-heiresses at law, was not excluded from a share of the fund which was given over, in the event which happened, to such person or persons as should be the testator's heir or heirs at law. In that case there was not, as in the present, a direction to the trustees to pay and assign the fund to the persons filling the character of a particular class, a direction absolutely inconsistent with the supposition that *Alexander* was to be included under the ultimate limitation. In *Jones v. Colbeck* (*b*), there was a gift of the residue of the testator's estate to his daughter, and

(*a*) 5 *Ves.* 399.

(*b*) 8 *Ves.* 33.

having made any appointment; and *B.* died without issue. *B.* is not excluded from the benefit of the limitation to *A.*'s next of kin.

Affirmed on appeal.

B. was the only surviving brother of *A.*, and there were children of a deceased brother of *A.*: Held, by the Lords Commissioners, over-ruling *Phillips v. Garth*, *Hinckley v. MacLarens*, and the decision in the present case at the Rolls, that the words "next of kin," used *simpliciter*, are to be taken to mean "nearest of kin," and that consequently *B.*'s personal representatives were entitled to the whole fund.

and a gift over, in the events which happened, among the testator's relations in a due course of administration, and Sir *William Grant* was of opinion that the personal representatives of the daughter were excluded, assigning as one of his reasons, that it was next to impossible that the testator would have taken that strange circuitous method of giving her the whole residue, in the event of her dying without children, instead of directly saying so. In the present case it is no less extravagant to suppose that the settlor meant, in the event of *Alexander* dying without issue, to give to *Alexander* a benefit under the designation of his "next of kin." It was said that in order to support the construction for which we contend, there must be added to the words "next of kin," the words "exclusive of my brother *Alexander*;" but there would be much more force in the argument that if the settlor under the words "next of kin" had intended to include a dead person, he would have used the words "inclusive of or not excluding my brother *Alexander*." In *Briden v. Hewlett* (a), where the testator gave his property to his mother for life, and after her decease to such persons as she should by will appoint, and, in case she should die without a will, to such persons as would be entitled to the same by virtue of the statute of distributions, the same Judge who decided the present case said it was clear the testator meant to exclude his mother from the class who were to take in the event of her intestacy. In *Bird v. Wood* (b), it was held, under similar circumstances, that the tenant for life, the testatrix's daughter, was excluded from a limitation to the next of kin of the testatrix. The case of a settlement is much stronger than that of a will. In a will the testator alone speaks, and where property is limited to a class who are to take upon a contingency, though a person belonging to the class may die before the

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(a) p. 90. *supra*.

(b) 2 Sim. & Stu. 400.

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the property vests in possession, the benefit of the contingency will go to his representative. But in a settlement both parties speak; the intention of both parties must govern the construction of the instrument; and it is impossible to hold that *Alexander*, being one of the parties to this contract, should have meant that a benefit should go to himself after his own decease; and further, that the trustees should assign and transfer the property, which was the subject of the settlement, to him, *Alexander*, after his own decease. In *Pearce v. Vincent* (a), a case sent to law from the Rolls, where estates were given to *A.* for life, with a power of appointing to an estate in fee a person answering a particular description, with remainder in default of appointment to such person, and the tenant for life himself answered that description, and made no appointment, it was held by the Court of Exchequer that the tenant for life was not excluded, but the late Master of the Rolls was dissatisfied with that opinion, and sent the case to another Court.

If the Court should decide against us on this point, the words "next of kin," used *simpliciter*, must be held to mean next of kin according to the statute of distributions; and the Plaintiffs will be entitled to a moiety of the fund as the children of the deceased brother of the settlor. The only two cases which exactly hit this point are *Phillips v. Garth* (b), and the late case of *Hinckley v. Maclarens* (c), where the late Master of the Rolls, after fully examining all the authorities, came to the conclusion that Mr. J. Buller's decision, as to the meaning of the words "next of kin," without more, had never been impeached, except perhaps in the case of *Brandon v. Brandon*; and that the *dicta*, which had fallen from Judges in disapprobation of that case, applied, not to his decision

(a) 1 *Crompt. & Mee.* 598;
 and see the next case.

(b) 5 *Bro. C. C.* 64.

(c) 1 *Mylne & Keen*, 27.

decision upon the effect of the words "next of kin," but to his distribution of the property *per capita* — a distribution inconsistent with the construction which he put upon the words "next of kin," because he thereby supported the statute for one purpose, and rejected it for another. It is true that in *Brandon v. Brandon (a)*, Sir Thomas Plumer considers the weight of authority to be against *Phillips v. Garth*, as to the construction of the words "next of kin;" but in *Brandon v. Brandon*, the words were "nearest and next of kin;" and what is said by Sir T. Plumer, as to the effect of the words "next of kin," taken *simpliciter*, must be considered as extrajudicial. The only question is, whether the words "next of kin" are to be considered as technical words, to be understood in the sense of next of kin according to the statute of distributions; for if they be technical words, and there is nothing to explain or control the sense in which they are to be understood, the settlor will be bound by them. That they are words of art, familiar to lawyers, and used by them in the sense of next of kin according to the statute, every day's experience demonstrates. In references to the Master to inquire who are the next of kin, and in minutes of decrees and other forms of proceedings in this Court where that expression is used, is it ever doubted whether the next of kin as in case of intestacy, or the nearest in blood, are intended; or does the Master, upon such a reference, ever understand the words "next of kin" in any other sense than that of next of kin according to the statute? Mr. J. Buller, so long ago as the year 1790, was of opinion that the words had acquired a well-ascertained technical meaning; his decision has never been over-ruled, or disapproved in any case where the same point came before the Court; and it has been followed in *Hinckley v. Maclarens*, in the

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(a) 5 Swanst. 312.

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case now under consideration, and in many other cases where the point has been considered too thoroughly settled to require argument. In *Stamp v. Cooke (a)*, it is expressly laid down by Lord *Kenyon*, that, if a testator makes a bequest to his "next of kin," and stops there, the statute is certainly the rule to go by.

LORD COMMISSIONER SHADWELL observed, that as to the first point, it appeared both to him and his brother Commissioner to be too clear to render any argument on the other side necessary. Had he (Lord Commissioner *Shadwell*) been called upon to settle the deed in such a manner as that, in the event of *Alexander Elmsley* being dead without children, *Alexander* should be included in the class of next of kin to whom the fund was ultimately limited, he should have used the words in this deed, and none other. The counsel on the other side would, therefore, confine themselves to the second point.

Mr. *Tinney* and Mr. *Lovat*, for the Defendants.

The Court having decided that *Alexander Elmsley* was not excluded by the terms of the settlement, we have next to contend that the representatives of *Alexander*, as the nearest in blood, are entitled to the whole fund. This must be considered as a question of intention, and it is clear that, according to the common understanding of mankind, the next of kin mean nearest in blood. If a man, having a brother, and a nephew the son of a deceased brother or sister, had, before the statute, been asked who was his next of kin, would he have hesitated in designating his brother? So, if he had two sons living, and grand-children, descendants of a deceased son, would he have included his grand-children in the description of his next of kin? There can be no doubt as

to

(a) 1 *Cox*, 234.

to the natural sense of the expression "next of kin," and that natural sense is recognised by the statute of distributions itself. The sixth section of the act (a) enacts, that "in case there be no children, nor any legal representatives of them, then one moiety of the said estate is to be allotted to the wife of the intestate, the remainder of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them." The next of kindred, therefore, are recognised as the nearest of kin, and those who legally represent them are expressly distinguished from such nearest of kin. The decision of Mr. J. *Buller* in *Phillips v. Garth* (b) has been successively disapproved by Lord *Thurlow*, Lord *Eldon*, and Sir *William Grant*; and in *Brandon v. Brandon* (c) it was expressly overruled by Sir *Thomas Plumer*. It is true, that the words in *Brandon v. Brandon* were "nearest and next of kin," but those words are not capable of being distinguished from "next of kin." With the exception of *Phillips v. Garth*, and *Hinckley v. Maclarens*, which followed it, there is no case in which an interpretation has been given to the words "next of kin," other than their natural, which is also their legal sense. All the other cases, in which the statute of distributions has been resorted to, are cases in which the expressions used by the testator have been of so vague a nature, such as "relations," and the like, that the Court has felt itself compelled to resort to some rule in order to give a definite meaning to the words used by the testator, and under such circumstances has considered the statute as the most equitable guide: *Thomas v. Hole* (d), *Green v. Howard* (e), *Lown des v. Stone* (g), *Harding v. Glyn* (h),

Wright

(a) 22 & 23 C. 2. c. 10.

(b) 3 Bro. C. C. 64.

(c) 3 Swanst. 312.

(d) *Ca. temp. Talb.* 251.

(e) 1 Bro. C. C. 31.

(g) 4 Ves. 649.

(h) 1 Atk. 462.

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Wright v. Atkyns. (a) *Even Stamp v. Cooke* (b), where Lord *Kenyon* uttered the *dictum* relied upon by the the other side, was a case of that description.

Mr. *Wigram*, in reply.

May 9.

LORD COMMISSIONER SHADWELL.

By the instrument which is the subject of the suit, the settlor, *Peter Elmsley*, in the event of the death of his brother *Alexander Elmsley*, and failure of his issue, gives a sum of stock to trustees upon trust to pay, assign, and transfer the same to himself *Peter Elmsley*, if he should be living, and if he should not be living, as he should appoint; and in default of appointment to such person or persons as should at the time of the decease of the said *Peter Elmsley* be the next of kin of him the said *Peter Elmsley*, and to and for no other use, trust, intent, or purpose whatsoever. *Peter Elmsley* died, leaving his brother *Alexander*, and children of a deceased brother *John*, surviving him; and the question is, whether the children of the deceased brother shall, by virtue of the words "next of kin," participate in the fund with the settlor's brother. It was said that the term "next of kin" means, by force of its own natural import, the persons who take as next of kin by the statute of distributions; but that this is not so is manifest upon the face of the statute itself, in the sixth section of which it is enacted, "that in case there be no children, nor any legal representatives of them, then one moiety of the estate is to be allotted to the wife of the intestate, the remainder of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them;" so that the statute does emphatically, in directing a distribution

(a) 1 *Turn. & Russ.* 143.

(b) 1 *Cor.* 234.

tribution in a particular case, take notice that the persons who are to take shall be the next of kin, and some other persons, besides the next of kin of the intestate. It is perfectly true that for the purposes of decrees and orders in this Court, the term "next of kin" is understood, as a matter of course, to signify those persons who would be entitled under the statute of distributions; a fact which will be manifest upon examination of the forms given in Mr. *Seton's* valuable book on decrees. It is by no means true, however, as a general proposition, that the term "next of kin" is taken to signify those who are entitled under the statute of distributions; and I say so, because, from my own personal knowledge, in marriage settlements, where a limitation is to be made of personal property brought in by the husband or wife in the event of the party bringing it in dying without leaving children, the limitation is never in any well-drawn settlement made to the next of kin, but it is always couched in these words, or words tantamount to them, that the property shall go to the person or persons who would be entitled to the clear residue of the personal estate of the party deceased, in case that party had died unmarried and intestate. This, or some such form of words is always found in every well-drawn conveyance, and this form of words shews that, in the opinion of conveyancers, a clear distinction exists between next of kin and those persons who are entitled under the statute of distributions.

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It appears that a doubt was first created upon this point by a *dictum* which fell from a most eminent and learned Judge, Lord *Kenyon*, in the case of *Stamp v. Cooke (a)*, which was decided in 1786. It is to be observed, that the only point which it was necessary to decide in that case was the construction to be put upon the words "next relations," coupled with

words

(a) 1 *Cox*, 234.

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words which went to interpret the testator's meaning, "as sisters, nephews, and nieces." It was not necessary to the decision of that point, that Lord *Kenyon* should use the expressions which are found in the report. Lord *Kenyon*, however, certainly does say that, "if the residue had been given to the 'next of kin,' and the testator had stopped there, the statute would have been the rule to go by; and although nephews and nieces are not in fact so near as brothers and sisters, yet the fund would have been distributable *per stirpes* according to the statute." But though this opinion was expressed by Lord *Kenyon*, if the report be correct, one cannot at the same time but think, with great humility, that the very words of the statute were not present to his Lordship's recollection, especially as it was not necessary for the decision of the case that any such proposition should be laid down. In 1790, the case of *Phillips v. Garth* (a) came before Mr. Justice *Buller*, sitting for the Lord Chancellor. In that case, the testator bequeathed the residue of his estate and effects to be equally divided to and amongst his next of kin, share and share alike. Mr. Justice *Buller* goes at some length into the cases, and he says, "I cannot distinguish this case from *Thomas v. Hole*; that case is in point, except that there the word is 'relations,' which being to be construed next of kin, makes it this case." It is not necessary for the decision of the present case, to advert to the construction which has been put upon the word "relations;" true it is that in some of the cases, in order to give some certainty to a word in itself of vague and indefinite signification, it has been held that those should take under the description of "relations" who would have been entitled to take under the statute of distribution. The decision in *Phillips v. Garth* was, that the residue should be divided

into

(a) 5 Bro. C. C. 64.

into thirteen parts, of which the brothers, nephews, and nieces were each to take one share. The cause afterwards came before Lord *Thurlow*, upon a petition of rehearing presented by one of the testator's nephews; but Lord *Thurlow*, inclining much in favour of the right of the brothers, directed the case to stand over to enable the brothers to present a petition, and the cause was subsequently compromised.

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In *Garrick v. Lord Camden* (a), Lord *Eldon* says, he had always great doubt upon the case of *Phillips v. Garth*; he states the reasoning upon which Lord *Thurlow* went in disapproving of Mr. Justice *Buller's* decision, namely, that "next of kin," being the only description, without the addition which is in the statute of those who represent them, the children of the deceased brothers and sisters ought not to take under such a bequest; and it appears that he coincided in opinion with Lord *Thurlow*. In *Smith v. Campbell* (b), Sir *William Grant* says, "even if the testator in this case had made use of the words 'next of kin,' instead of his 'nearest surviving relations,' yet if there had been nothing in the will to shew that he meant the next of kin according to the statute of distributions, I should have thought the brothers and sisters would have been exclusively entitled;" and he proceeds to notice Mr. Justice *Buller's* decision to the contrary in *Phillips v. Garth*, and Lord *Thurlow's* disapprobation of that decision. Then we have the case of *Brandon v. Brandon* (c) before Sir *Thomas Plumer*, where the limitation was to the "nearest and next of kin of *Abigail Brandon*;" and the question was, whether the brother of *Abigail Brandon* was exclusively entitled, or whether children of two deceased sisters were entitled to participate; so that the case is in effect the same as the present, with the

(a) 14 *Ves.* 372.

(b) *Coop.* 277.

(c) 5 *Swanst.* 312.

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the addition only that the words were "nearest and next of kin," instead of the words "next of kin" by themselves. Sir *Thomas Plumer* notices the disapprobation of the decision in *Phillips v. Garth* expressed by Lord *Thurlow*, Lord *Eldon*, and Sir *W. Grant*; and he arrives at the conclusion, that the weight of authority is against the doctrine of *Phillips v. Garth*. The Master of the Rolls took further time to consider the case; and when he delivered his final judgment, he adhered to the opinion which he had before expressed.

We have therefore the authority of Sir *Thomas Plumer* overruling *Phillips v. Garth* in a case which is in terms the same, except as to the addition of the word "nearest," which appears to me to make no difference in the case. We have the disapprobation of Lord *Thurlow*, the disapprobation of Lord *Eldon*, the disapprobation of Sir *W. Grant*; all these Judges concurring in the opinion expressed by Sir *Thomas Plumer*. It appears, therefore, to me, and my brother Commissioner, who will state his own opinion upon the point, that it is impossible to get over the weight of these authorities; that Sir *Thomas Plumer's* decision was, both on principle and in point of authority, the right one; and that the decision of the late Master of the Rolls was wrong. His Honor's decree, therefore, as to this part of the case, must be reversed.

LORD COMMISSIONER BOSANQUET.

As the judgment pronounced by the Court is a judgment of reversal, I think it my duty to assign my reasons for concurring in that judgment. The question is, whether the doctrine laid down by Mr. *J. Buller*, in the case of *Phillips v. Garth*, respecting the meaning of the words "next of kin," and adopted by the late Master
of

of the Rolls in *Hinckley v. Maclarens*, can be supported. In *Phillips v. Garth*, Mr. J. Buller, referring to a rule laid down by himself in *Hodgson v. Ambrose* (a), sets out by saying that, where the testator uses technical phrases, the Court is bound to understand them as such, unless the testator uses other expressions in other parts of the will which shew that he did not mean to use those phrases technically; and he says that, if the words "next of kin" are technical words, they must prevail in the case before him. He afterwards says, "I cannot distinguish this case from that of *Thomas v. Hole*. That case is in point, except that there the word is 'relations,' which being to be construed 'next of kin,' makes it this case."

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The two grounds, then, upon which the decision of Mr. J. Buller proceeds, are first, that the words "next of kin" have, since the statute, acquired a particular meaning; and, secondly, that the case of *Thomas v. Hole* was a decision in point to govern that case. Now how, and when, and to what extent did the words "next of kin" acquire any particular meaning distinct from their known legal meaning? That before the statute the meaning of those words was clear and intelligible, and that there was no difficulty in applying them, as they had been applied on former occasions and according to the language of Lord Coke, to the next in blood, there can be no doubt. How, then, did they acquire a different meaning; and how can that meaning be applied to an instrument which does not profess to relate to the statute of distributions — which does not profess to relate to an intestacy — but which, on the contrary, professes to point out the particular persons who are to take the property, and which, as it appears to me, indicates an anxiety not to leave any part of the settlor's property undisposed of? Do the words "next of kin" imply that a distribution

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bution is to be made according to the directions of the statute, or are they to be construed "next of kin" as described in the statute? That they do not imply a distribution according to the provisions of the statute, is, I think, clear from this circumstance, that they do not extend to the wife; for it is not argued that they extend to the wife. Mr. J. *Buller*, in his judgment, considered them not as determining the manner in which the property was to be distributed, but as a *descriptio personarum*; and having used the words for the purpose of determining what persons were to take, he then availed himself of the words of the particular instrument, namely, "share and share alike," for the purpose of determining the mode of distribution, and he accordingly directed a distribution *per capita*.

If the words "next of kin" are to be understood according to the description of the statute, it is necessary to consider what the description of the statute is. The statute says, "to every of the next of kindred to the intestate, who are in equal degree, and those who legally represent them;" so that next of kin described by the statute are those in equal degree, to which the statute superadds other words, describing the representatives as distinct from the next of kin. If the words "next of kin" have acquired any particular meaning, I would ask how far does that meaning extend, and where is the ground for saying that they import more or less than their natural legal sense? If they include the representatives of deceased persons, at what period does that representation stop? Do the words "next of kin," used simply and absolutely, and without reference to any intestacy, or to the statute, include not merely representatives, but representatives limited by a particular description afterwards to be found in the statute? I find great difficulty in saying, even supposing this to be a case devoid of all authority, that the words "next of

of kin," used as they are in an instrument having no reference to the disposition of property in case of intestacy, and that instrument being not a will, but a deed, can possibly be construed in a different sense from that which the law ascribes to them.

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As to the second ground upon which *Phillips v. Garth* was decided, namely, that *Thomas v. Hole*, where the word "relations" was held to mean next of kin according to the statute, was a case in point, it is to be observed, that the ground upon which in *Thomas v. Hole*, and many other cases, the words "relations" and "family" have been held to import next of kin according to the statute, is this, — that those expressions, being in themselves vague and indefinite, must of necessity receive some limitation; and the statute has been taken as the criterion of the limitation to be imposed upon them. The words "next of kin" are in themselves definite; the word "relations" is in itself indefinite; the reason, therefore, which applies for imposing this limitation in the one case does not apply in the other.

The case of *Phillips v. Garth*, however, is not devoid of authority to support it.

In *Stamp v. Cooke*, which was decided two years before the case of *Phillips v. Garth*, Lord *Kenyon* expresses himself in terms which directly apply to this case. It is, however, an extra-judicial opinion, and not necessary for the decision of the case before him. The testator in that case gave the residue of his estate to his "next relations, as sisters, nephews, and nieces." The state of the testator's family is necessarily to be attended to; there were three sisters, and one child of a deceased sister, and another child of a deceased brother, living at

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his death. The distribution was made into five parts, each of the sisters taking one part, and the two representatives of the deceased brother and sister taking respectively another part. It will be observed that, in this case, admitting that representation was to take place with reference to the shares of the deceased parents, the question did not arise whether the children were to take *per capita*, or *per stirpes*, because there was but one child of each parent; and I believe it will be found that there is no case in which such a distribution has been directed as that made by Mr. J. Buller in *Phillips v. Garth*.

In *Lowndes v. Stone*, the words were, “to the next of kin, or the heir at law.” These words are either alternative words, or they are ambiguous; either the bequest was void for uncertainty, in which case the property would go according to the statute of distributions; or it was to be construed so as to give effect to all the words employed, in which case they might reasonably be taken to mean the nearest kindred entitled to take by legal succession, and consequently to import a distribution according to the provisions of the statute. This case, therefore, is not applicable to one in which the words “next of kin” are employed without context to explain them; and I only refer to it that I may not be supposed to have passed it over.

If the case decided by Mr. J. Buller were unopposed by any authority, the Court would be extremely unwilling to disturb an opinion pronounced so long ago, and which had been acquiesced in; nor can we fail to regard the *dictum* of Lord Kenyon, in *Stamp v. Cooke*, with that reverence to which every thing which fell, either judicially or extra-judicially, from a person so eminently learned, is entitled; but we must also look at
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the opinions pronounced by distinguished judges upon the other side of the question, and we are bound to examine the weight of opposing authorities.

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In the first place, it appears to me that the case of *Phillips v. Garth* cannot strictly be considered as an authority, because the judgment of Mr. J. Buller, who sat for Lord Thurlow, was not carried into effect. The decision of that learned Judge was, that the next of kin were to be considered as the persons described in the statute of distributions; but, instead of giving effect to that decision, he directed that the property should be divided into thirteen parts, thus giving only one thirteenth to each of the surviving brothers, and one thirteenth to each of the nephews and nieces. It is clear, from what Lord Eldon said in *Garrick v. Lord Camden*, that Lord Thurlow's doubt was not merely as to the distribution *per capita*, but that he objected to letting in the nephews and nieces at all to participate with the surviving brothers. In the result, the suit was compromised, and a distribution *per stirpes* took place by agreement between the parties. Now, I am by no means satisfied that if Mr. J. Buller had not felt himself bound to decide that the distribution should be *per capita*, he would have come to the same conclusion that he did, or that he might not in that case have reasoned thus:—"If these words are not to be taken as a *descriptio personarum* including all these persons, and consequently involving a distribution *per capita*, then I must revert to the true and legal meaning of the words 'next of kin,' and confine the bequest to those who are really the next of kin." In *Garrick v. Lord Camden*, Lord Eldon not only states the ground of Lord Thurlow's objection to the decision in *Phillips v. Garth*, but he says that he himself had "always great doubt of the case before Mr. J. Buller." And why?

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Because Mr. J. Buller thought that those who were to take *per stirpes*, as well as those who were to take *per capita*, were included. Now, those who were to take *per stirpes* are the representatives, and those who were to take *per capita* are the kindred in equal degree; and Lord Eldon's doubt of the propriety of Mr. J. Buller's decision was, that it included those who were to take by representation as well as those who were to take *per capita*, because they were in equal degree. That, as it appears to me, was a distinct disapprobation of the principle of including representatives in the words "next of kin." Lord Eldon observes, in the case before the Court (*Garrick v. Lord Camden*), that it would be very difficult to say that representatives would not take under that will. By that will the testator directed the property to be divided among his next of kin, as if he had died intestate; Lord Eldon, therefore, imports into his view of the particular case the words "as if he had died intestate;" and there being a distinct reference to the case of intestacy, he was of opinion that the distribution should be made according to the statute, with this qualification, however, that, regard being had to the context of the whole will, there was no intention that the widow should be included.

In addition to the opinion of Lord Thurlow and Lord Eldon with respect to Mr. J. Buller's decision in *Phillips v. Garth*, there is the opinion of Sir William Grant, which certainly was not confined to that part of Mr. J. Buller's judgment which relates to the distribution *per capita*. In *Smith v. Campbell* Sir W. Grant says, "Even if the words were 'next of kin,' yet if there was nothing to shew that the testator had reference to the statute of distributions, or to a division, as in the case of intestacy, the inclination of my opinion would be that the nearest in kindred only are entitled, and that brothers and sisters

sisters would exclude nephews and nieces from participating in such a bequest. I know the contrary was determined by Mr. J. Buller, in *Phillips v. Garth*, who held that, under the words 'next of kin,' two surviving brothers were not alone entitled, but nephews and nieces were included with them. That case came before Lord Thurlow, but not upon that point, the brothers not appealing from Mr. J. Buller's decision; but the inclination of Lord Thurlow's opinion was so strong against that of Mr. J. Buller, that his lordship directed the cause to stand over, that the brothers might have an opportunity of applying to rehear the cause. It was, however, compromised; and there was no decision of that point." Sir W. Grant goes on to say, "In the case of *Garrick v. Lord Camden*, the Lord Chancellor, referring to Lord Thurlow's doubt, states his own also, with regard to that decision of Mr. J. Buller." Now, the letting in of the representatives was the part of the decision which Sir W. Grant had himself been objecting to.

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Then, there is the distinct and positive opinion of Sir T. Plumer, in *Brandon v. Brandon*, who says expressly the case of *Phillips v. Garth* is directly in point, yet decides against it. He says that it was not approved by Lord Thurlow; that it was doubted by Lord Eldon; that Sir W. Grant would have decided in favour of the brothers; and adds, that Sir W. Grant's "opinion was uttered after a review of all the authorities, and affords the third instance of a judicial disapprobation of the doctrine of Mr. J. Buller." And Sir T. Plumer himself, after a full examination of the cases, comes to the conclusion that the weight of authority is against the doctrine of *Phillips v. Garth*.

The decision of Mr. J. Buller has, however, been followed by the late Master of the Rolls, whose opinion is undoubtedly entitled to great respect, in the case of *Hinckley v. Maclarens*;

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Maclarens ; and he adhered to the opinion expressed by him in that case in the case now under consideration. In *Hinckley v. Maclarens* his Honor said "the inclination of his opinion was extremely strong that, where the words 'next of kin' were used *simpliciter* in a gift over, and without explanatory context, shewing a different intention on the part of the testator, they must be taken to mean next of kin according to the statute of distributions. The decision in *Phillips v. Garth* had not been impeached except as to the distribution of the property, which Mr. J. Buller divided *per capita*, and not *per stirpes*, thereby supporting the statute for one purpose, and rejecting it for another. This was directly the effect of Lord Eldon's objection to that decision ; it might also be the effect of Sir William Grant's objection to it in *Smith v. Campbell* ; and if not the effect of Sir Thomas Plumer's objection to it in *Brandon v. Brandon*, the words of the settlement in that case were such as to render the decision not inconsistent with *Phillips v. Garth*. In fact, the appeal against Mr. J. Buller's decision was abandoned upon a compromise among the next of kin, by which the property was divided between them *per stirpes*, and not *per capita* ; which shews the ground of the objection taken to the decision, and the opinion entertained of that part of it which directs the mode of distribution."

If the observations I have made upon this subject, and the view which I take of the case, be correct, the objection to Mr. J. Buller's judgment was not to the distribution *per capita*, but to the foundation itself of the judgment. The objection was, that Mr. J. Buller had not given the property exclusively to the two brothers. If that be so, the observation made by the late Master of the Rolls for the purpose of getting rid of the effect of the subsequent cases appears not to be well founded.

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Undoubtedly there are very great authorities on the one side, and on the other; and it is the duty of the Court to weigh these authorities. We are called upon by our duty to decide according to the best opinion which we are able to form; and, having reviewed the authorities with the best diligence I could apply to the subject, I think myself bound to come to the conclusion, that the weight of authority is against the decision of Mr. Justice *Buller*, with respect to the meaning of the words "next of kin," when used *simpliciter*, and against the opinion of the late Master of the Rolls in *Hinckley v. Maclarens*, and in the case now before the Court.

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A testator devised his real estates to his first cousin, *Thomas Pearce*, for life; and after *T. P.*'s decease, he devised all his estates, as well real as personal, to such of his relations of the name of *Pearce*, being a male, as *T. P.* should by deed or will appoint; and in default of such appointment, to such of his relations of the name of *Pearce*, being a male, as *T. P.* should approve of or

adopt, if he should be living at the death of *T. P.*, and his heirs, executors, &c. And in case *T. P.* should not adopt any such male relation, or no such male relation should be living at the death of *T. P.*, then to the next and nearest relation or nearest of kin of him the testator of the name of *Pearce*, being a male, or the elder of such male relations in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, executors, administrators, or assigns, for ever."

The testator had a brother *Z.* who had gone to sea, and had not been heard of for many years; and, supposing *Z.* to have died without issue, the nearest relation of the testator at his decease was the tenant for life *T. P.*; and next to him, *R. P.*, the Plaintiff.

T. P. died without issue, and without having exercised the power of appointment or adoption given to him by the will.

Quære, as to the right of *T. P.* to take under the ultimate limitation.

RICHARD PEARCE, by his will, dated the 30th of March 1813, after devising certain estates to be sold for the payment of debts and legacies, and giving the surplus of the produce of sale, after such payment, to his cousin, *Thomas Pearce*, and after bequeathing an annuity of 200*l.* to *Mary Heywood*, to be paid out of his freehold and copyhold estates, not thereinbefore devised, gave and devised his manors of *Flamstead* and *St. Agnells*, in the county of *Hertford*, and his manor of *Stanwick*, in the county of *Northampton*, and also all and every his lands, real estates, and hereditaments, both freehold and copyhold, situate in the counties of *Hertford*, *Leicester*, and *Northampton* (except the estates before devised to be sold, and the advowson of the rectory of *Husbands Bosworth*), or elsewhere, unto his said cousin, *Thomas Pearce* and his assigns, for and during the term of his natural life; and he gave, devised, and bequeathed all his said manors, and his advowson of *Husbands Bosworth* aforesaid, and all his lands and hereditaments situate in the counties of *Hertford*, *Leicester*, *Northampton*, and elsewhere,

where, and all his stocks, funds, and securities for money, and all and singular other his real and personal estate (save and except as hereinafter was specifically bequeathed or mentioned); and also all his copyhold lands and hereditaments, except the estates before devised to be sold, subject, nevertheless, to the life estate thereinbefore given to his said cousin *Thomas Pearce* of and in the said manors and manorial rights, lands, and hereditaments, and to the payment of the annuity therein mentioned, to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, conditions, declarations, and agreements hereinafter mentioned, expressed, and declared; and from and after the decease of his said cousin *Thomas Pearce*, he devised all and singular the said premises, as well his real estate, as personal, to such of his relations of the name of *Pearce*, being a male, as his cousin the said *Thomas Pearce* should by deed or will in manner therein mentioned give, devise, or bequeath, or nominate, or appoint the same to; and in default of any such gift, devise, bequest, or nomination, or appointment by his said cousin *Thomas Pearce* to or in favour of any such male relation of him the testator of the name of *Pearce* as aforesaid, then he devised the said estates and premises to such of his the testator's relations of the name of *Pearce*, being a male, as the said *Thomas Pearce* should approve of or adopt for the purposes of education (which the testator authorised and directed the said *Thomas Pearce* to do as soon as he could conveniently after his the testator's decease), if he should be living at the time of the decease of his said cousin *Thomas Pearce*, and his heirs, executors, administrators, and assigns, for ever; and in case the said *Thomas Pearce* should not have approved of or adopted any such male relation as aforesaid, or in case he should have made such approval and adoption, and there should not be any such male relation living

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living at the time of the decease of the said *Thomas Pearce*, then he devised the said estates and premises unto the next or nearest relation, or nearest of kin of him the testator of the name of *Pearce*, being a male, or the elder of such male relations, in case there should be more than one of equal degree who should be living at his the testator's decease, his heirs, executors, administrators, or assigns, for ever. And as to the advowson of *Husbands Bosworth* aforesaid, the testator gave the first and next presentation to the same rectory which should happen after his decease to certain persons therein mentioned in succession; and in case none of them should choose to present, or refuse the same, then he directed that the presentation to his said rectory should at all times go and belong to his said cousin *Thomas Pearce*, to present to at all times during the life of the said *Thomas Pearce*. And the testator gave all his plate, books, &c., and household furniture, to his executors, in trust to permit his said cousin *Thomas Pearce* to have, use, and enjoy the same during his life; and, after his decease, then in trust for the persons who should succeed to or inherit the testator's real estates under and by virtue of his will; and the testator declared his will to be, and he thereby ordered and directed the said *Thomas Pearce* to pay and apply so much of the rents and profits of his said estates, so given, devised, and bequeathed by the testator to him for his life as aforesaid, not exceeding the annual sum of 200*l.*, as he in his judgment and discretion should think proper, for and towards the maintenance and education of such person, being a male relation of him the testator, of the name of *Pearce*, whom his said cousin should approve of and adopt in manner aforesaid, in case such male relation should, at the time of such adoption, be a minor under age, until such person should have attained his age of twenty-one years; and invest the residue of the said annual sum of 200*l.* (not expended

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in such maintenance and education) at interest, to accumulate, in the name of his said cousin *Thomas Pearce*, in some of the public funds, or upon government or real securities, during the minority of such male relation of the name of *Pearce*; and the testator declared and directed that his said cousin *Thomas Pearce*, his executors and administrators, should stand possessed of such accumulations in trust for the benefit of such male relations of the name of *Pearce*, and the same, with the dividends and interest, should be assigned to him at such times and in such proportions, after he should have attained the age of twenty-one years, as his said cousin *Thomas Pearce*, his executors or administrators, should think most to his advantage; and in case of his death before attaining twenty-one years of age, then in trust for the benefit of such male relation of the name of *Pearce* as should upon the decease of his the testator's said cousin become entitled to his the testator's estates by virtue of his will; and in case such male relation of the name of *Pearce*, so approved of and adopted by his said cousin *Thomas Pearce* as aforesaid, should, in the lifetime of his said cousin, attain twenty-one years of age, then the testator willed and directed his said cousin *Thomas Pearce*, during his life, to pay and allow out of the rents and profits of the estates so devised to him for his life as aforesaid unto such male relation, from the time of his attaining twenty-one years of age, the whole of the said annual sum of 200*l.*; provided also, and the testator declared, that it should be lawful for, and he did thereby authorise and empower his said cousin *Thomas Pearce* to demise or lease all or any part of his said manors, farms, lands, and tenements for any term of years not exceeding seven years, to take effect in possession, and at the best and most improved annual rent, presently payable, and without taking any fine or premium as therein mentioned.

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The testator died on the 3d of January 1814, leaving his sister his heiress at law, who afterwards died without issue, *Thomas Pearce*, the son of the testator's uncle *Robert Pearce*, who was the person named as the testator's first cousin in the will, and who was, at the testator's death, sixty-seven years of age; *Richard Pearce*, the Plaintiff in this suit, who was the son of the testator's uncle *William Pearce*, and who was sixty-six years of age at the testator's death; and *William Pearce*, brother of the Plaintiff, who was, at the decease of the testator, fifty-nine years of age. *Thomas Pearce* died without issue, on the 18th of May 1827, having never exercised his power of appointment or adoption in favour of any relation of the testator, and having made his will, by which he devised all his real estate to a stranger. The question in the cause was, whether the Plaintiff, or *Thomas Pearce*, took any, and what, interest under the ultimate limitation contained in the will of the testator.

Mr. Bickersteth and *Mr. Wright*, for the Plaintiff.

The question in this case is, whether the testator meant that *Thomas Pearce*, in the event of his making no appointment or adoption, should take under the ultimate limitation in the will as his nearest of kin being a male, or whether the testator intended his nearest of kin, exclusive of *Thomas Pearce*, to take under that limitation. It seems perfectly clear that the testator meant to give no benefit to *Thomas Pearce* beyond the life-estate expressly devised to him; to which life estate was added a power of appointing or adopting a person answering a particular description, who was to take absolutely. The whole scope of the will is inconsistent with the supposition that the testator meant to include *Thomas Pearce* under the description of a person who was to take by virtue of the ultimate limitation. In case there should be no such male relative as he had described

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living at the death of *Thomas Pearce*, then the testator directs his trustees to stand possessed of the trust estates in trust for his nearest male relation, of the name of *Pearce* who should be living at the time of his own decease. This language amounts almost to an express exclusion of *Thomas Pearce*, and it is, at any rate, impossible to give a sensible construction to the ultimate disposition of the testator's estates, except on the supposition that the tenant for life was meant to be excluded. It will scarcely be contended that, when the testator gave to *Thomas Pearce* the power of nominating a person answering a particular description, who should take under the ultimate limitation, he meant to give him the option of nominating himself; and yet, where is the difference, if *Thomas Pearce* could in effect accomplish the same object, by abstaining from the exercise of his power of nomination? In *Cholmondeley v. Clinton* (a), where the ultimate limitation in the conveyance was to the right heirs of *Samuel Rolle*, the grantor being himself, at the date of the conveyance, the right heir of *Samuel Rolle*, Mr. J. Bayley, and Sir T. Plumer were of opinion that the ultimate remainder vested in the person who happened to be the right heir of *Samuel Rolle* at the expiration of the estates previously limited. On the same principle the person answering the description of the testator's nearest of kin at the date of the will must be intended to have been excluded from his contemplation. *Bird v. Wood* (b), except that the estate there in question was personal estate, is a case similar to the present. In that case the testatrix gave a sum of stock in trust for her daughter for life, and after her death as she should appoint, and in default of appointment, to the testatrix's next of kin, to be considered as a vested interest at the testatrix's death, except only as to any child afterwards born of her daughter.

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(b) 2 Sim. & Stu. 400.

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The daughter died without having had any child, and without having made any appointment, and it was held that the persons who would be the testatrix's next of kin at her death, if her daughter had then been dead without issue, were entitled. The intention to exclude the daughter was manifest, because the interest of the persons taking as next of kin under the ultimate limitation was to vest at the death of the testatrix, except only as to an after-born child of the testatrix's daughter. Such an exception would have been altogether insensible, if she had not meant next of kin other than her daughter, or such persons as would be her next of kin at her death, if her daughter had then been dead without issue.

In the present case, the intention to exclude *Thomas Pearce*, or rather not to include him in the description of the person who is to take under the ultimate limitation is, throughout the will, no less manifest. The testator gives his plate, furniture, &c. to his executors, in trust to permit *Thomas Pearce* to have and enjoy the same during his life, and "after his decease, in trust for the person who should succeed to or inherit the testator's real estates under and by virtue of his will." He also gives the next presentation to the living, in the event of the persons mentioned in his will declining to exercise the right given to them, and all future presentations, to his cousin *Thomas Pearce*, at all times during the life of him, the said *Thomas Pearce*. These dispositions of the testator's chattels, and of the advowson, as well as the provisions made for the application of the fund to be applied by *Thomas Pearce* to the maintenance of a person answering the description of the testator's nearest male relation, and the power of leasing for seven years, are all inconsistent with an intention on the part of the testator to give to *Thomas Pearce* any thing beyond a life-interest in any part of his property.

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There are many cases besides *Bird v. Wood*, where the tenant for life, though next of kin, has been held incapable of taking under an ultimate limitation to the next of kin, which are extremely pertinent to the present case, and which I could have wished to hear cited.

Mr. Pemberton and Mr. Preston, contra.

One of the established rules for the construction of wills is, to give to the words used by a testator their ordinary and legal meaning; and the Court is bound to give to such words their ordinary and legal meaning, unless it plainly appears from the context that the testator meant to use them in a different sense. There can be no difficulty as to the ordinary meaning of the words, "my next and nearest relation, or nearest of kin, of the name of *Pearce*, being a male, or the elder of such male relations, in case there should be more than one of equal degree, who shall be living at my decease." It is indisputable that *Thomas Pearce* is the only person answering this description; and it is not pretended that there are any words in the will expressly excluding *Thomas Pearce*. But it is argued that he is excluded by implication; and it is asked, why did the testator give him an estate for life, with a power of appointment or adoption, and introduce provisions for the maintenance of the person adopted, if he meant that *Thomas Pearce* should take in fee? The answer to this is, that the testator did not use the words in the ultimate limitation as a description of *Thomas Pearce*, but as a description of a person, to which description it has by accident happened, and by an accident which might not be, and probably was not in the contemplation of the testator, that *Thomas Pearce* answers. It is only necessary to bear

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in mind this distinction, and the whole argument founded upon the inconsistencies of other parts of the will with *Thomas Pearce's* title under the ultimate limitation falls to the ground. If the testator had known that *Thomas Pearce* would be the individual answering the description in that limitation, it would undoubtedly have been nugatory to introduce a number of complicated provisions in his will, instead of giving him at once the fee. But the testator did not and could not know who would answer the description. *Thomas Pearce* does not take as *persona designata*; he does not take as the individual intended by the testator; but as the individual who by accident answers the description of the person who becomes entitled at the time when the ultimate limitation is to take effect.

The distinction is most essential and important between a devise to a person as *persona designata*, intended by the testator to take in his individual character, and a devise to a class or description of persons, that class being necessarily uncertain when the will is made, and during the lifetime of the testator, and ascertainable only at the time when the devise is to take effect. No authority can be produced to shew that a gift to a class can be invalidated, because a person who answers the description of the donee under the gift to the class takes an estate under the will, which is inconsistent with the notion that the testator intended him to take the benefit given to the class. Yet that is the proposition which must be made out on the other side, before the title of *Thomas Pearce* can be defeated.

With respect to *Cholmondeley v. Clinton* (a), it is to be recollected that there were the opinions of three common

law

(a) 2 Mer. 171

law judges to one against the opinion which is supposed to support the view of the present case taken on the other side; and though the opinion of Sir *Thomas Plumer* coincided with that of the single judge, Sir *William Grant* was clearly of opinion that the limitation to the right heirs of *Samuel Rolle* vested the estates in the person who answered that description at the time when the limitation was made. The case of *Doe dem. Bailey v. Pugh* (a), cited by Sir *William Grant* in his judgment in *Cholmondeley v. Clinton* (b), has a strong application to the present case. In that case a testator, having but one son, introduced into his will an ultimate limitation to "my right heirs, my son excepted; it being my will that he shall have no part of my estates either real or personal." The Court of King's Bench was of opinion in that case, that the words were to be interpreted as if the testator had said, "those who would be my right heirs, if my son was dead;" but that opinion was reversed in the House of Lords, where it was the unanimous opinion of the Judges, that no person took any estate under the devise in question, the limitation being, in fact, "to the testator's right heirs, his right heir excepted," and consequently repugnant. If *Thomas Pearce*, therefore, had been expressly excluded in the devise to the testator's nearest of kin, there might, upon this authority, be ground for contending that the limitation was repugnant, and, consequently, inoperative; but there can be no ground for disputing the right of *Thomas Pearce* under the ultimate limitation, when there is no direct exclusion, and when it is admitted that he is the person answering the description in that limitation.

1852.

PEARCE
v.
VINCENT.

The

(a) *Butler's Fearn App.* 575. (b) 2 *Mer.* 348.
3 *Bro. P. C.* 454. *Toml.* edit.

1832.
 {
 PEARCE
 v.
 VINCENT.

The MASTER of the ROLLS said, that as this was a legal question affecting real estate, the best course would be to send a case to a court of law.

A case was accordingly directed to be sent to the Court of Exchequer. It appeared from a pedigree annexed to the case sent to the Exchequer that the testator had a brother of the name of *Zachary Pearce*, who had gone to sea, and had not been heard of for many years. The questions for the opinion of the Court were, first, whether, under the circumstances stated, *Thomas Pearce* took any, and what estate under the ultimate limitation contained in the will of the testator; secondly, whether the Plaintiff, *Richard Pearce*, took any, and what estate under the ultimate limitation in the will.

The following certificate was sent by the Judges of the Court of Exchequer:—

This case has been argued before us by counsel; we have considered it, and are of opinion that, under the circumstances here stated, if *Zachary Pearce*, the testator's brother, died without issue in the lifetime of the testator, *Thomas Pearce* took under the ultimate limitation in the testator's will, an estate in fee-simple in the testator's real estates, and an absolute interest in his personalty.

LYNDHURST.
 J. BAYLEY.
 J. VAUGHAN.
 W. BOLLAND.

1833.
 June 10.

On the cause coming back to be heard upon this certificate,

Mr.

Mr. *Bickersteth* and Mr. *Wright* contended that the opinion of the Judges of the Court of Exchequer was inconsistent with the plain intention of the testator, to be collected from the whole will and which intention must govern its construction; that that opinion was not binding upon the Court, and that if the case were one which necessarily called for the assistance of a court of law, which, they submitted, it was not, the cause ought not to be disposed of without further investigation.

1838.
PEARCE
v.
VINCENTY.

Mr. *Pemberton*, Mr. *Preston*, and Mr. *Kindersley*,
contra.

The MASTER of the ROLLS.

The opinion of the Judges of the Court of Exchequer may be capable of being supported by some strict technical rule of law, which it would be difficult to reconcile to a plain understanding, though I am not at present aware that there is any such rule of law. If *Thomas Pearce* is to take under this gift, he must take because it appears from the will to have been the intention of the testator that, in the events which have happened, he should take. This is not the case of an heir at law, who cannot be excluded unless there is an expressed intention to exclude him, but we must here find an intention on the part of the testator that *Thomas Pearce* should take. Now, what is this will? The testator gives to *Thomas Pearce* an estate for life, with a power of appointing to an estate in fee, after his death, some person who should fill the character of a male relation of the testator, bearing the name of *Pearce*. This power of appointment, therefore, is so limited according to the expressed intention of the testator, that the donee of the power can appoint the fee to no person except to a male relation of the testator of the name of *Pearce*; and the testator gives

1833.

PEARCE

v.

VINCENT.

the fee, in case no such appointment should be made, to such male relation of the name of *Pearce* as should be in the nearest degree; and if there were several relations in equal degree, then to the eldest of such relations living at his death.

It is said that *Thomas Pearce* was the nearest male relation of the testator living at his death, and that, therefore, the testator must have intended that *Thomas Pearce*, to whom he had given an estate for life, with a limited power of appointment in fee, should be the person, in the event which have happened, entitled to take under this description. What would be the effect of such a construction? Why, that the power of appointment should not be limited to a male relation of the testator of the name of *Pearce*, but that the estates might be given to a mere stranger. Is there then to be found in this will a clearly expressed intention on the part of the testator that the remainder should extend to *Thomas Pearce*, or would not any man of plain understanding say, that it is the clear intention of the testator that *Thomas Pearce* should not take under this limitation? It is quite inconsistent with the limited power given to *Thomas Pearce* of appointing to a male relation of the name of *Pearce*, that the testator should have intended to include *Thomas Pearce* in the description contained in the ultimate limitation, and thereby give him the power of defeating the object of the appointment. It is my duty, therefore, to submit this case to further investigation, and the only question is, in what manner it is to be further investigated. After the decision to which the Court of Exchequer has come, I cannot again send the case to that Court, and I rather regret having sent it at all; but having once sent the case to a court of law, I shall direct a second case to be sent to the Court of Common Pleas.

The

1833.

PEARCE
v.
VINCENT.

The case was argued before the Judges of the Court of Common Pleas on the 12th of *June* 1835, and the Judges took time to consider their certificate.

JUDD v. WARTNABY.

ROLLS.
1855.
June 4.

A MOTION was made, on the part of the Plaintiffs, that the Defendant might be ordered, within four days, to enter his appearance with the registrar, and consent to a serjeant-at-arms as in the case of a commission of rebellion returned *non est inventus*, in pursuance of an order made by the Master, dated the 14th of *May*, and that the answer of the Defendant to the Plaintiffs' amended bill might not be received by the Defendant's clerk in Court until such appearance was entered accordingly.

The twenty-first of the last New Orders does not alter the former practice in respect of the third application for time, where the Master gives no special direction.

On the 14th of *May* the Defendant made a special application under the 3 & 4 *W. 4. c. 94.* and the orders of the Court, for further time to answer the amended bill, the second order for time expiring on the following day. The Master was of opinion that no case was made for granting further time except upon the terms imposed upon defendants on accepting the third order for time; and he accordingly ordered that the Defendant should be allowed a fortnight's time to put in his answer to the amended bill, the Defendant entering his appearance with the registrar, and consenting to a serjeant-at-arms as in the case of a commission of rebellion returned *non est inventus*. On the same day on which this order was made,

1835.

 Judd
 v.
 Wadsworth.

made, the Defendant's solicitor gave notice to the Plaintiffs' solicitor, that the Defendant would not accept of the conditional order for further time. The Plaintiffs themselves, on the 22d of *May*, drew up the conditional order.

Mr. Pemberton and *Mr. G. Russell*, in support of the motion.

Pending the conditional order giving a fortnight's time, which was made on the Defendant's application, it was impossible for the Plaintiffs' clerk in Court to issue an attachment. It became necessary, therefore, for the Plaintiffs to draw up the order upon the Defendant's refusal to do so, for otherwise the Defendant would obtain all the benefit of the indulgence without performing the condition upon which further time was granted; namely, entering his appearance with the registrar, and consenting to a serjeant-at-arms. This was an order made upon notice to the other side, which gave a benefit to the Defendant, subject to a condition, and it was not competent to the Defendant to refuse to comply with that order, and to take the benefit while he escaped the performance of the condition. By the old practice, upon the third application for time, the party obtaining the indulgence was required, within four days, to enter an appearance with the registrar, and consent to a serjeant-at-arms; and if he did not do so, an attachment might issue, as if no order for further time had been made. Under the twenty-first of the last New Orders, no time is fixed for the performance of the condition, and at which the attachment may issue; and the Court is bound, therefore, to take care that the terms upon which the indulgence was granted are complied with.

Mr.

CASES IN CHANCERY.

815

Mr. *Blunt*, *contra*.

1836.

JUDG
v.
WARTMAN.

The order, being conditional, implies the alternative of a refusal to accept it, and that refusal was communicated to the Defendant before the time for answering under the former order for time had expired. The Plaintiffs were at liberty if they thought proper, as soon as the time for answering had expired, to issue an attachment; but they precluded themselves from so doing by their own irregularity, in having drawn up the order which the Defendant refused to accept. If the order had not been drawn up, it would have been no bar to the issuing of the attachment: *Gayler v. Fitzjohn* (a). The Court is called upon by this application to make a conditional order an absolute one, and to compel the Defendant to do an act by which he may be deprived of his liberty; a proceeding for which the practice of the court furnishes no precedent.

Mr. *Pemberton*, in reply.

The effect of the New Orders cannot, from the nature of the thing, be determined by reference to precedents, and where a difficulty arises in acting under them, the Court must make a precedent for the regulation of future practice. It is clear that it was not intended by the twenty-first order, to give the benefit of further time to the Defendant, unless he complied with the condition. The third order for time under the old practice, was an *ex parte* order, and it was open to the Defendant to avail himself of it or not as he thought proper. Here the order was made upon notice, and was binding upon both parties.

The

(a) 1 Sim. 386.

1835.

Judd

v.
WARTNABY.*The MASTER of the ROLLS.**

It is clear that the twenty-first of the new order does not alter the old practice, but that it leaves to the Master the same jurisdiction in respect of the three applications for time, unless under any special circumstance the Master shall otherwise direct. By the former practice, four days were allowed to the Defendant for the performance of the condition, and it cannot possibly be intended by the New Order to place the Defendant in much worse situation, as he would be, if he were entitled to no time, and the conditional order might be made an imperative one. There may be a defect in the form of the Order, but I am clearly of opinion that the Plaintiffs cannot compel the Defendant to enter an appearance and consent to a serjeant-at-arms, and that a compulsory consent, indeed, cannot be the effect of any conditional order. In the present case, there is the less ground for the application, as the Defendant, before the order of time had expired, and consequently before the Plaintiffs could have adopted any proceeding, informed the Plaintiffs that he should not take advantage of the conditional order.

Motion refused with costs.

* Sir C. Pepys.

1835.

ATTORNEY-GENERAL v. The HABERDASHERS' Company.

ROLLS.
June 17.

MR. COOPER applied to the Court to vary the minutes of the decree by which it had been referred to the Master to settle a scheme for the administration of the charity, so far as related to a direction, that the Attorney-General should attend the inquiry before the Master. That direction had been introduced by the Registrar in conformity with a rule laid down by the late Master of the Rolls, that the Attorney-General should attend before the Master in every case of reference for the settlement of a scheme for the administration of a charity. The Attorney-General attended by counsel, and, where the charity fund was small, the expense of the inquiry was considerably and unnecessarily increased by a rigid adherence to this rule. In the present case the fund, which had been given for the benefit of poor freemen of the *Haberdashers' Company*, did not much exceed 1100*l*. The practice of the Vice-Chancellor was, not to require the attendance of of the Attorney-General, except when it was absolutely necessary.

The attendance of the Attorney-General before the Master, upon a reference to settle a scheme for the administration of a charity, may be dispensed with in certain cases.

A direction for such attendance in a case where the charity fund did not much exceed 1100*l*. was struck out of the minutes of the decree.

*The MASTER of the ROLLS**, after conferring with the Registrar, said, he was of opinion that in this case the attendance of the Attorney General was not necessary, and that the direction for his attendance might therefore be struck out of the minutes.

* Sir C. Pepys.

1885.

ROLLS.

April 1,

BARKER v. WARDLE.*

Costs as between solicitor and client given out of the fund to a simple contract creditor who was Plaintiff in a suit to administer his deceased debtor's estate, although the assets had proved insufficient to satisfy the specialty creditors,

THE bill was filed by simple contract creditors to have the testator's estate administered and their debts paid. Under the decree specialty creditors came in and proved debts to an amount exceeding the value of the assets received.

The cause having come on for further directions, Mr. Barber, for the specialty creditors, objected to the Plaintiffs being allowed their costs, and he referred to *Young v. Eperest*. (a)

Mr. Pemberton and Mr. Turner, for the Plaintiffs, asked for their costs as between solicitor and client. *Young v. Eperest* had been overruled by *Larkins v. Paxton*. (b)

The MASTER of the ROLLS† directed, that the Plaintiffs should have their costs as between solicitor and client out of the fund in Court,

* *Ex relatione* Mr. Turner.

† Sir C. Pepys.

(a) 1 *Russ & Mylne*, 426: 20
Rowlands v. Tucker, *Ibid.* 635.;
 and see *Chissum v. Dewes*, 5 *Russ*.
 29.

(b) p. 320. *supra*; and see
Tootal v. Spicer, 4 *Sim.* 510.

1854.

LEES v. NUTTALL.

1854.
Feb. 19, 30.

IN this case, which is reported, upon the hearing at the Rolls, in 1 *Russell and Mylne*, 53, an appeal was brought by the Defendant, *Nuttall*, against the decree, so far as it affected him: the other Defendant, *Walker*, did not appeal.

If an agent, employed to purchase an estate, becomes the purchaser for himself, he is to be considered as a trustee for his principal. Affirmed on appeal.

Mr. Bethell, for the Appellant, insisted upon his right to begin, on the ground that the appeal was only partial.

The LORD CHANCELLOR, however, decided that it was to be considered as substantially an appeal from the whole decree, and that the Plaintiff was, therefore, entitled to begin.

Mr. Pepys and *Mr. K. Parker* were accordingly heard for the Plaintiff; the *Attorney-General*, *Mr. Wakefield*, and *Mr. Bethell*, for the Appellant.

The LORD CHANCELLOR considered the case made by the bill to be fully established by the evidence, and affirmed the decision of the Court below.

1855.



In the Matter of the DE CLIFFORD Estates.

1855.
June 29.

Before the
Lords
Commissioners.

THIS matter having again come before the Court (a) on a petition to confirm the Master's report finding that *George G. Blackwell* was a trustee within the meaning of the act, and approving of a person to convey the estates to the petitioners,

LORD COMMISSIONER SHADWELL, after reading and considering the petition, made the order as prayed.

(a) See p. 624. *supra*.

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TO

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ACCESS.

Access is such access as affords an opportunity of sexual intercourse; and where there is evidence of such access between a husband and wife within a period capable of raising the legal presumption as to the legitimacy of an after-born child, the Court will not direct an issue upon evidence shewing the continued adulterous intercourse of the wife with another man, and the improbability of the husband being the father, but will declare the legitimacy of the child. *Bury v. Phillpot*.

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See NEW TRIAL.

ACCOUNT.

See CORPORATION.

VOL. II.

ADMINISTRATOR.

Under the common decree against an administrator, directing his intestate's assets to be applied in a due course of administration, the Master is not entitled to go into the consideration of transactions between the administrator and the other creditors which might affect the administrator's right of retainer for a debt due to himself. *Spicer v. James*. Page 387

See LUNATIC, 1.

SEPARATE ESTATE, 1.

AGENT.

1. An order for the taxation of an agent's bill cannot be obtained as of course by a solicitor; nor can the rule for bringing the amount of the agent's bill into court upon such application be dispensed with, except under special

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cial circumstances. *Lees v. Nuttall*. Page 284

. A solicitor may practise in the name of an attorney as his agent in the courts of law ; but an attorney-at-law cannot practise in the name of a solicitor as his agent in the courts of equity. *Hockley v. Bantock*. 437

3. If an agent, employed to purchase an estate, becomes the purchaser for himself, he is to be considered as a trustee for his principal. *Lees v. Nuttall*. 819

See SOLICITOR.

AGREEMENT.

See SPECIFIC PERFORMANCE.

ALIENATION.

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ALLOTMENT.

An inclosure act, reciting that S. was entitled, as lord of a manor, to the soil and royalties, and, as lay rector, to all tithes within the manor, and that he claimed right of common on the waste in respect of the soil and royalties, directed certain allotments to be made to him in compensation for his right to the soil of the waste, and to the tithes, and that the residue of the waste should be divided among S. and the other persons having right of common upon such waste in proportion to their respective claims ; and it reserved to the lord the seignory

and royalties. The act made no mention of any right of warren existing in the lord ; but there was some evidence that S. had used part of the waste as a rabbit-warren. The award gave an allotment to S. for his right of warren, and also three other allotments, which purported to be made for his right to the soil, his right to the tithes, and his right of common and other rights and interests in the waste, respectively ; which allotments were declared to be a full compensation for all his right and interest in the lands directed to be inclosed : Held, that S.'s title to the warren allotment was not such as a purchaser could be compelled to take. *Casamajor v. Strobe*. Page 706

AMENDMENT.

1. A plaintiff may by amended bill introduce new matter which occurred prior to filing the original bill, in order to fortify his case, but he cannot introduce new matter which occurred subsequently to the filing of the original bill, without a supplemental bill ; and the defendant having in his answer to the amended bill stated this objection to the new matter, and insisted upon the same advantage as if he had demurred or pleaded thereto, and the plaintiff not being able to support his case upon the evidence which referred to the allegations of the original bill, the bill

bill was dismissed with costs. *Wray v. Hutchinson.* Page 235

2. If after replication filed, the plaintiff has on special leave amended his bill in such a manner as to call for an answer, he may afterwards obtain, as of course, a further order to amend at any time before the answer to the amended bill is put upon the file. *Wharton v. Swann.* 362

ANNUITY.

B. by his marriage settlement, made in 1811, covenanted to secure upon certain estates an annuity of 400*l.* for his wife for her life, in case she should survive him, in addition to the provision made for her by the settlement. He afterwards, by a deed, executed in 1818, and intended to be made in pursuance of the covenant, granted an annuity of 400*l.* to his wife, which was made payable to her after his decease, during her widowhood. By his will, made in 1830, after ratifying and confirming the settlement, he gave an annuity of 400*l.* to his wife during her widowhood, in addition to the provision made for her by the settlement: Held, that the widow was entitled both to the annuity granted to her by the deed, and the annuity given by the will. *Douce v. Lady Torrington.* 600

See WILL, 15.

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An admission of assets for the payment of a legacy is an admission of assets for the purposes of the suit, and extends to costs, if the Court thinks fit to give them. *Philanthropic Society v. Hobson.*

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See ADMINISTRATOR.

MARSHALLING.

ASSIGNEE.

A., as assignee of *B.*, a bankrupt, gave an undertaking to *C.*, who was the mortgagee of one farm, and was under a contract to purchase another farm, both the property of the bankrupt, and who had a distress upon the mortgaged premises, that if the distress were withdrawn he would pay to *C.* the arrears then due in respect of the mortgage, out of the effects on the premises. *C.* withdrew the distress accordingly, and afterwards the bankruptcy was annulled before *A.* had obtained possession of any part of the bankrupt's effects; whereupon *C.* brought an action on the undertaking, and recovered judgment against *A.* personally: Held, on a bill filed by *A.* against *C.*, to which *B.* was no party, that *A.* could have no relief in equity against the judgment at law; and that he was not entitled, as against *C.*, to claim

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repayment of the sum thereby recovered out of the price which C. had contracted to pay for the other farm. *Pell v. Stephens*.

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See COVENANT, 1, 2.

ATTORNEY-GENERAL.

The attendance of the Attorney-General before the Master, upon a reference to settle a scheme for the administration of a charity, may be dispensed with in certain cases.

A direction for such attendance in a case where the charity fund did not much exceed 1100*l.* was struck out of the minutes of the decree. *Attorney-General v. Harbardashers' Company*. 817

AUTHORITY TO SUE.

See COVENANT, 1.

SOLICITOR, 1.

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See ALLOTMENT.

BANKRUPT.

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JUDGMENT.

BARON AND FEME.

By the marriage settlement of a widow, her property was assigned to two trustees, upon trust to invest and pay the dividends to her for her life for her own sole and separate use, and after her decease upon trust to pay the fund to her daughter by her first husband,

“for her own use and benefit. The daughter's husband, F. who was one of the trustees of the settlement, became bankrupt. Held, that on the death of tenant for life, the assignee F. H. was entitled to the fund subject to the wife's equity of redemption. *Kensington v. Kensington*. Page

See EVIDENCE.

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CANAL ACT.

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CATHOLIC RELIGION.

A testatrix directed several sums to be paid to certain Roman Catholic priests and chapels, desiring they might be paid as soon as possible after her decease, she might have the benefit of prayers and masses; and she directed the residue of her property to be paid to the trustees, upon trust, to pay each to the ministers of certain specified Roman Catholic chapels for the benefit of their prayers for the repose of her soul, and the souls of her deceased husband, and to appropriate the remainder in such way as they might judge best calculated to promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of Swale Dale. *Wenston Dale*: Held, that gifts to priests and chapels

void, and that the next of kin was entitled to the benefit of the failure, but that the gift of the residue was valid within the 2 & 3 W. 4. c. 115. *West v. Shuttleworth*. Page 684

CATHOLIC SCHOOLS.

A testator gave two legacies to the respective trustees of certain Catholic schools, upon trust, for carrying on the good designs of the said schools. The testator died in 1823: Held, that the 2 & 3 W. 4. c. 115. for securing the charitable donations and bequests of his Majesty's Catholic subjects is retrospective, and that the trustees of the Catholic schools were entitled to the legacies. *Bradshaw v. Tasker*. 221

CHARGE.

1. The testator began his will by directing that all his just debts, funeral and other incidental expenses, should be paid with all convenient speed after his decease. By a codicil he devised a particular estate, upon trust, in the first place, to pay the annuity to his wife, and to apply the surplus to the payment of his simple contract debts: Held, that the real estate was not charged with the payment of debts.

Quære, Whether the introductory words, without more, would have charged the real estate? *Douce v. Lady Torrington*. 600

2. A testator, after a specific bequest of part of his personal estate, devises all his freehold, copy-

hold, and leasehold estates, and all the residue of his personal estate and effects, after payment of his just debts and funeral expenses, to trustees, their heirs, executors, and administrators, upon certain trusts. The real estate is charged with the payment of debts. *Withers v. Kennedy*. Page 607

See EXECUTOR, 1.

TENANT FOR LIFE.

CHARITY.

1. Where a corporation follow the practice of their predecessors in the application of the profits of charity estates, and no wilful breach of trust or improper motive is imputed to them, the account will not be carried back beyond the time when they had notice that the propriety of such application was questioned. But where the charity estates have been alienated, though at a very distant period, the corporation will be made to compensate the present value of the lands so alienated, out of such general property of the corporation as was not granted or devised to them upon special trust.

It is the duty of a corporation, when apprised by the information of the nature and extent of the claims made upon them, to cause a diligent examination to be made, before they put in their answer, of all deeds, papers, and muniments in their possession or power, and to give in their answer all the information de-

rived from such examination; and if they pursue an opposite course, and in their answer allege their ignorance upon the subject, and the information required is afterwards obtained from the documents scheduled to their answer, the Court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice, and on that ground alone will charge them with the costs of the suit. *Attorney-General v. The Bailiffs and Burgesses of East Retford.* Page 35

2. Where annual sums were bequeathed to persons, to be distributed in charity, at the discretion of the legatees, either to private individuals or public institutions, the Court declared that the legacies did not fail, but that a scheme was unnecessary; leaving any of the parties at liberty to apply, as there might be occasion. *Horde v. The Earl of Suffolk.* 59

3. A testator gave two legacies to the respective trustees of certain Catholic schools, upon trust, for carrying on the good designs of the said schools. The testator died in 1823: Held, that the 2 & 3 W. 4. c. 115., for securing the charitable donations and bequests of his Majesty's Catholic subjects, is retrospective, and that the trustees of the Catholic schools were entitled to the legacies. *Bradshaw v. Tasker.* 221

4. The Court has jurisdiction to extend the application of the income of charity property beyond

the mere literally expressed intention of the testator, provided the income be applied to subjects connected with that intention. *Attorney-General v. Dixie.*

Page 342

5. A testator gave the residue of his estate to trustees, positively forbidding them to diminish the capital thereof, or that the interest and profit arising be applied to any other use or uses than thereinafter directed; and he proceeded to direct one moiety of the income to be applied to a charitable purpose which failed; and the other moiety to be applied to other specified charitable purposes. Held, upon appeal, that the Court had jurisdiction to apply *cyprès* the income of the moiety devoted to the charitable purpose which failed. *Attorney-General v. Ironmongers' Company.* 576

6. Where the surplus of the rents and profits of an estate, charged with certain stipulated payments for the benefit of a charity, is expressly devised by the will of the founder to his executors and their heirs, for their sole use and benefit for ever, the charity can claim only the stipulated payments, although, by the change in the value of money, such payments have become inadequate to the charitable intentions of the founder.

The teaching of writing and arithmetic may be well introduced into a scheme for the management

ment of a free grammar school.
Attorney-General v. Gascoigne.

Page 647

7. Where money had been bequeathed for the purpose of being lent out without interest, in sums not exceeding 200*l.*, and the Master, in settling a new scheme for the charity, had directed the maximum of the sums so lent out to be 500*l.*; it was held, that as the latest of the wills was 200 years old, the increase in the amount of the loans was not inconsistent with the intention of the testators.

The costs of an information must be paid by a company in which a charitable fund is vested, if the charity be suffered to fall into desuetude. *Attorney-General v. The Mercers' Company.* 654

See ATTORNEY GENERAL.
CATHOLIC RELIGION.

COMMITMENT.

See CONTEMPT.

CONDITION.

A testator gave his real estates to his wife for life, and after her decease to his grand-daughter, the only child of his deceased daughter, her heirs and assigns; but in case she should die under twenty-one without issue, then over: Held, that the grand-daughter, who was the testator's sole heir at law, took at the death of the tenant for life, by descent, and not by purchase. *Manbridge v. Plummer.* 93

CONSTRUCTION OF STATUTES.

See STATUTES.

CONTEMPT.

The sheriff's return of a caption and rescue is a sufficient ground, without affidavit, for an absolute order of commitment for contempt.

Where a party previously in contempt for disobeying an order, is taken into custody and committed to the Fleet for a contempt in effecting a rescue, the custody shall be held to apply to both the contempts, and both must be cleared before the party can be discharged; and subsequent orders up to a sequestration, proceeding upon such commitment, are not vitiated because they refer to the original contempt only. *Blackwell v. Tatlow.* Page 321

CONTRIBUTION BETWEEN TENANT FOR LIFE AND REMAINDER-MAN.

1. Where a testator provides a fund for the payment of fines on admission to copyholds, or on renewals of leases, the manner of raising the fines, and the question of contribution between the tenant for life and the remainder-man, must depend upon the intention of the testator, to be collected from the whole will. *Playters v. Abbott.* 97
2. Where the first trust of leasehold
3 H 4 pro-

property held for lives and years is to pay the fines on renewals out of the rents and profits, and the next trust is for the benefit of those who in strict settlement take freehold and copyhold property under the same will, the expenses of renewal are incidental to the leasehold property, and fall upon those who from time to time are entitled to the possession of it under the will. *The Earl of Shaftesbury v. The Duke of Marlborough*. Page 111

See TENANT FOR LIFE.

COPYHOLD.

1. Where a copyhold was surrendered to a mortgagee and his heirs, and no condition was expressed in the surrender, and the mortgagee died intestate and without an heir, it was held that the lord of the manor was entitled to enter upon the copyhold as an escheat. *Attorney General v. The Duke of Leeds*. 343
2. The right of the equitable owner of a copyhold estate to dispose of his equitable interest by will cannot be controlled by the custom of a manor.
A custom inconsistent with the doctrine of resulting trusts, as, that a person named by the purchaser of a copyhold estate, as the second life according to the custom, shall take beneficially, is unreasonable. *Lewis v. Lane*. 449
3. The Court will not reform an

entry on the court rolls, unless the lord be a party to the suit, or consent to such order as the Court shall think fit to make; but, the lord consenting to such order, the Court decreed that a surrender and admission on the court rolls, which gave an interest to the wife of a mortgagor in fraud of the mortgage, should be reformed. *Elston v. Wood*.

Page 678

CORPORATION.

Where a corporation follow the practice of their predecessors in the application of the profits of charity estates, and no wilful breach of trust or improper motive is imputed to them, the account will not be carried back beyond the time when they had notice that the propriety of such application was questioned. But where the charity estates have been alienated, though at a very distant period, the corporation will be made to compensate the present value of the lands so alienated, out of such general property of the corporation as was not granted or devised to them upon special trust.

It is the duty of the corporation, when apprised by the information of the nature and extent of the claims made upon them, to cause a diligent examination to be made, before they put in their answer, of all deeds, papers, and muniments in their possession or power, and

and to give in their answer all the information derived from such examination; and if they pursue an opposite course, and in their answer allege their ignorance upon the subject, and the information required is afterwards obtained from the documents scheduled to their answer, the Court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice, and on that ground alone will charge them with the costs of the suit. *The Attorney-General v. The Bailiffs and Burgesses of East Retford.*

Page 35

COSTS.

1. Where a bill contains scandalous imputations on the character of the defendant, the defendant will not subject himself to the payment of costs by answering such imputations, although he objects at the same time to the introduction of the matters so answered on the ground of irregularity in point of pleading. *Wray v. Hutchinson.* 235
2. A person named a trustee in a deed, who declines to accept the office, is in the situation of any other defendant against whom a bill is dismissed, and can only have his costs as between party and party. *Norway v. Norway.* 278
3. A simple contract creditor, who files a bill for the administration of a testator's assets, is entitled

to have his costs out of the estate, though the assets prove insufficient for the payment of the specialty creditors. *Larkins v. Paxton.* Page 320

4. An admission of assets for the payment of a legacy is an admission of assets for the purposes of the suit, and extends to costs, if the Court thinks fit to give them. *Philanthropic Society v. Hobson.* 357
5. A plaintiff who is a peer, and out of the jurisdiction, must give the usual security for costs. *Lord Alborough v. Burton.* 401
6. Where it appears upon the bill that the plaintiff is an officer in his Majesty's service, and out of the jurisdiction, the defendant will be entitled to the usual security for costs, unless it be distinctly stated that the plaintiff is on actual service. It is not sufficient to state that the plaintiff is an officer of a particular regiment, and residing at a particular place out of the jurisdiction, although the regiment may, in fact, be stationed at that place. *Lillie v. Lillie.* 404
7. Where a plaintiff upon his bill misstates his place of residence, the Court will order him to give security for costs. *Sandys v. Long.* 487
8. The costs of an information must be paid by a company in which a charitable fund is vested, if the charity be suffered to fall into desuetude. *Attorney General v. The Mercers' Company.* 654

9. Costs

9. Costs as between solicitor and client given out of the fund to a simple contract creditor who was plaintiff in a suit to administer his deceased debtor's estate, although the assets had proved insufficient to satisfy the specialty creditors. *Barker v. Wardle*.
Page 818

See CHARITY, 1.

TRUSTEE, 1.

VENDOR AND PURCHASER, 2.

COUNSEL.

The Court will not interfere in questions arising upon the practice of retainer.

A motion for an injunction to restrain a particular counsel, who had acted for the defendants, from acting, at a subsequent stage of the proceedings, on behalf of the plaintiffs from whom he had received a retainer, was refused. *Baylis v. Grout*.
316

COVENANT.

1. The *Monmouthshire* Canal Act provided that, upon auxiliary rail-roads made by private individuals under the authority of the act, the tolls should not exceed the rate charged by the canal company, which, for the articles of limestone and ironstone, was restricted to $2\frac{1}{2}d.$ a ton per mile; and it also empowered the canal company, by agreement with the land-owners, itself to construct auxiliary rail-roads, on which tolls not exceeding $5d.$ a ton per mile might be charged. Certain

landowners and owners of iron works, and, among others, the lessees of the *Beaufort* Works, formed a joint stock company, and, under the powers given by the act, constructed a rail-road connecting a lime quarry, called the *Trevil* Quarry, with the several iron works and with the rail-roads of the canal company. In the partnership deed of the rail-road company, the lessees of the *Beaufort* Works covenanted for themselves, their heirs, executors, administrators, and assigns, with the other shareholders, their executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns, should occupy the *Beaufort* Works, to procure all the limestone used in the said works from the *Trevil* Quarry, and to convey all such limestone, and also all the ironstone from the mines to the said works along the *Trevil* rail-road, and to pay a toll of $5d.$ a ton per mile for the same.

Upon a bill filed by the shareholders of the rail-road to enforce this covenant against a person who had purchased the *Beaufort* Works, with notice of the partnership deed: Held,

First, that the covenant did not run with the land so as to bind assignees at law; and that a court of equity would not, by holding the conscience of the purchaser to be affected by the notice, give the covenant a more extensive oper-

operation than the law allowed to it :

Secondly, that the covenant securing a toll of 5*d.* a ton per mile to the shareholders of the *Trevil* rail-road, was a fraud upon the canal company, and the legislature, and therefore ought not to be specifically enforced by injunction.

Some of the shareholders having been made co-plaintiffs in the bill without their privity or consent, on their application an order was made, with costs, that their names should be struck out as plaintiffs. *Keppell v. Bailey.*

Page 517

2. Where land is conveyed in fee, by deed of feoffment, subject to a perpetual ground-rent, and the feoffee covenants for himself, his heirs and assigns, with the feoffor, the owner of adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands, that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a court of equity will not interpose to enforce the covenant, but will leave the parties to law.

Whether upon such a covenant there could be any remedy at law

against the assigns of the covenantor, *quære.* *Duke of Bedford v. Brit. Mus.* Page 552

CREDITOR'S SUIT.

See Costs, 3. 9.

CUSTOM.

See COPYHOLD, 2.

DEBTOR AND CREDITOR.

If property be conveyed by a debtor in trust for the benefit of creditors, who are neither parties nor privy to the deed, the deed merely operates as a power to the trustees to apply the property in payment of debts, and such power is revocable by the debtor.

Quære, Whether a communication by the trustees to the creditors of the fact of such a trust will not defeat the power of revocation by the debtor. *Acton v. Woodgate.* 492

DEPOSIT OF DEEDS.

1. Where an equitable security is given by the deposit of deeds, the plaintiff is, on a bill brought to give effect to his security, entitled to a decree for a sale. *Pain v. Smith.* 417
2. In the decree upon a bill by an equitable mortgagee, the equitable mortgagor will be allowed six months to redeem the deposited deeds. *Parker v Housefield.* 419

DE-

DESCENT.

1. A testator gave his real estates to his wife for life, and after her decease to his grand-daughter, the only child of his deceased daughter, her heirs and assigns; but in case she should die under twenty-one without issue, then over: Held, that the grand-daughter, who was the testator's sole heir at law, took at the death of the tenant for life, by descent, and not by purchase. *Manbridge v. Plummer.* Page 93
2. An estate, of which *A.* died seised in fee, descended upon *A.*'s five infant sisters. The father and mother of the infants being both living, and the estate of the sisters being consequently liable to be devested by the birth of a nearer heir of *A.*, it was held, that the infants were not seised of or entitled to land in fee, within the meaning of the 1 *W. 4. c. 65. s. 17.* *In the matter of Evans.* 318

DEVISE.

See WILL.

DOUBLE PROVISION.

- B.* by his marriage settlement, made in 1811, covenanted to secure upon certain estates an annuity of 400*l.* for his wife, for her life, in case she should survive him, in addition to the provision made for her by the settlement. He afterwards, by a deed executed in 1818, and intended to be made in

pursuance of the covenant, granted an annuity of 400*l.* to his wife, which was made payable to her after his decease, during her widowhood. By his will, made in 1830, after ratifying and confirming the settlement, he gave an annuity of 400*l.* to his wife during her widowhood, in addition to the provision made for her by the settlement: Held, that the widow was entitled both to the annuity granted to her by the deed, and the annuity given by the will. *Douce v. Lady Torrington.* Page 600

ELECTION.

See STOCK.

ENROLMENT OF DECREE.

The answer of the Lord Chancellor to a petition of appeal relates to the day at which the petition was presented.

Where, therefore, a petition of appeal was presented within twenty-eight days after notice had been given of a docket of the decree having been presented for signature, and, the Lord Chancellor being in *Scotland*, the petition was not answered until after the expiration of the twenty-eight days, the enrolment of the decree was vacated. *Richards v. Wood.* 621

EQUITABLE MORTGAGE.

See DEPOSIT OF DEEDS.
MORTGAGE.

ES-

ESCHEAT.

Where a copyhold was surrendered to a mortgagee and his heirs, and no condition was expressed in the surrender, and the mortgagee died intestate and without an heir, it was held that the lord of the manor was entitled to enter upon the copyhold as an escheat. *Attorney-General v. The Duke of Leeds.* Page 343

EVIDENCE.

The admissions in a joint answer by the husband and wife are no evidence against the wife, such joint answer being considered as the answer of the husband alone. *Elston v. Wood.* 678
See SPECIFIC PERFORMANCE, 2.

EXCEPTIONS.

1. A party may take exceptions to the Master's report of impertinence at any time before the impertinent matter is actually expunged; and the practice in this respect is not altered by the twenty-second of the last new orders, which provides that impertinent matter shall not be expunged until the expiration of four days from the filing of the report, "in order that the adverse party may have an opportunity of filing exceptions to such report." *Evans v. Owen.* 382
2. Where the Master by his report finds a fact involving, according to the practice of the Court, a particular consequence, the Court

will act upon the fact so found, and it is not a ground of exception that such consequence is not stated in the report. *Bick v. Motly.* Page 315

EXECUTOR.

1. A testator in the first place directs the payment of his debts and legacies by his executors after named. He afterwards devises a real estate to his son *T. D.* in fee; and in a subsequent part of his will names *T. D.* and another person his executors, who both prove the will. The estate devised to *T. D.*, not being a devise to the executors after named, is not charged with debts and legacies. *Warren v. Davies.* 49
2. A bequest of residue "to my executors hereinafter named, to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble, equally between them," followed by the appointment of three persons as executors, is a gift to those persons as a class in their official character; and, therefore, one having died in the lifetime of the testator, the whole residue vests in the two survivors. *Knight v. Gould.* 529
3. The Master found that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were

were both largely indebted to that estate; and that the sums so received by them were debts proveable under their respective commissions, both executors having become bankrupt: Held, that interest at 5 per cent., as the consequence of the *devastavit*, was to be added to the principal sums found to be proveable against the bankrupt estates of the executors. *Bick v. Motly*, Page 315

4. Executors charged with the profits made by them from the employment of the testator's assets in any trade or business since the testator's decease. *Palmer v. Mitchell*. 672

See TRUSTEE, 2.

EXPECTANT HEIR.

Where an expectant heir, under pecuniary pressure, mortgages his reversionary interest to obtain an advance of money or credit for a purchase of goods, and the party in present possession of the property so mortgaged stands in *loco parentis* to such heir, and knows and approves of the transaction, the heir has no equity to have it afterwards rescinded.

Where an expectant heir, who, under pecuniary pressure, has granted securities over his reversionary estate, subsequently allows the consideration given for the securities to be so dealt with that it can never be restored to the other party in its original condition, he will not be relieved against those securities unless he

can shew a continuance of the pressure compelling him to act as he did.

Where goods are sold to a person in distressed circumstances by a tradesman who knows they are bought merely with a view to raise money by selling them again, and they are charged at fair and reasonable prices, the Court will not interfere to relieve the purchaser, or set aside securities given for the price. *King v. Hamlet*. Page 456

FINE.

1. Where a testator provides a fund for the payment of fines on admission to copyholds, or on renewals of leases, the manner of raising the fines, and the question of contribution between the tenant for life and the remainder-man, must depend upon the intention of the testator, to be collected from the whole will. *Playters v. Abbott*. 97
2. Where the first trust of leasehold property held for lives and years is to pay the fines on renewals out of the rents and profits, and the next trust is for the benefit of those who in strict settlement take freehold and copyhold property under the same will, the expenses of renewal are incidental to the leasehold property, and fall upon those who from time to time are entitled to the possession of it under the will. *The Earl of Shaftes-*

Shaftesbury v. The Duke of Marlborough. Page 111

FOREIGN LAW.

Where a contract is made between persons domiciled in a foreign country, and in a form known to the law of that country, the Court, in administering the rights of parties under it, will give it the same construction and effect as the foreign law would have given to it.

If, therefore a domiciled *Scotchman* would be held entitled, in *Scotland*, by virtue of a marriage contract executed there, and in the *Scotch* form, to receive whatever property accrued during coverture to his wife, this Court will enforce his right, as against any such property coming within its jurisdiction, and will not raise an equity for a settlement in favour of the wife, in opposition to the provisions of the contract. *Anstruther v. Adair.* 513

FRAUD.

A man, already married, performed the ceremony of marriage with *G. W.*, and joined with her in executing an assignment of her life interest in a trust fund to a purchaser. The fraud practised upon *G. W.* by the person acting in the character of her husband did not affect the validity of the assignment, nor was it necessary to make the supposed husband a party to a suit instituted by the purchaser to

obtain the benefit of the assignment. *Sturge v. Starr.* Page 195

See EXPECTANT HEIR.

GRAMMAR SCHOOL.

See CHARITY, 4. 6.

ILLEGITIMATE CHILDREN.

Where by deed an estate was limited to an after-born illegitimate son in fee ; and if he should die before he attained twenty-one, then in fee to a living illegitimate child, who died an infant ; and an after-born illegitimate son attained the age of twenty-one : it was held that the last limitation failed, and that the devised estate descended to the heir of the grantor. *Lomas v. Wright.* 769

IMPERTINENCE.

A party may take exceptions to the Master's report of impertinence at any time before the impertinent matter is actually expunged ; and the practice in this respect is not altered by the twenty-second of the last new orders, which provides that impertinent matter shall not be expunged until the expiration of four days from the filing of the report, "in order that the adverse party may have an opportunity of filing exceptions to such report." *Evans v. Owen.* 382

IMPLICATION.

A testatrix gave to *J. B.* and his wife, and the survivor of them, an

an annuity of 100*l.* during their respective lives, in case *J. B.* should become incapable to collect, or be discharged from collecting, the rents of a particular estate: the annuity to commence and become payable from the first quarter day after her decease, or after he should cease to collect the rents. The husband survived the testatrix, but died soon afterwards, having continued to receive the rents till his death. The wife is entitled to the annuity of 100*l.* for her life. *Brittain v. Fleming.* Page 147

INCLOSURE ACT (GENERAL).

The provision in the General Inclosure Act, that the commissioners' oath, and the appointment of any new commissioner, shall be annexed to and enrolled with the award, is merely directory. *Cassamajor v. Strobe.* 706

INFANT.

1. Where a testator gave his real estates, and also his residuary property, to his wife for life, with remainder to an infant great nephew for life; a statement in the will that it was his particular wish and request that his wife and the infant's grandfather would superintend and take care of the infant's education, so as to fit him for any respectable profession or employment, was held, under the circumstances, and upon the effect of the whole instrument, to charge the maintenance and education of the infant upon the interest taken by

the testator's widow under the will. *Foley v. Parry.* Page 138

2. Where a bill has been filed on behalf of infants, under circumstances raising a strong suspicion against the motives of the next friend, the Court will direct an inquiry whether the suit is for the benefit of the infants; and if so, whether such next friend is a proper person to conduct it, or otherwise who is a proper person to be appointed next friend in his place. *Nalder v. Hawkins.* 243

3. Where a decree has been made against an infant defendant, who put in the common answer by his guardian, the general rule is, that such defendant on coming of age has the privilege of putting in a new answer stating a different case, and of going into evidence in support of that case.

The privilege does not extend to foreclosure suits. *Kellsall v. Kellsall.* 409

See MAINTENANCE.

INJUNCTION.

Special injunction granted, under the circumstances, to stay process of outlawry, and all further proceedings at law against the plaintiff in equity, the Court requiring the plaintiff in equity to give judgment in the action, with stay of execution, to be dealt with as the Court should thereafter direct. *Drummond v. Pigon.* 168

See COUNSEL.

JURISDICTION, 2.

PRACTICE, 10, 11.

IN-

INSOLVENT.

A conveyance or payment made to a creditor by a person in insolvent circumstances, upon such person's own motion, without any pressure or threat on the part of the creditor, or made colourably with a view to divert the property from other creditors, or made with a view to give a preference to a particular creditor, within three months before the imprisonment of the insolvent, is a *voluntary* conveyance or payment within the meaning of the 7 G. 4. c. 57. s. 32. *Stuckey v. Drewe.* Page 190

INTEREST.

See EXECUTOR, 3.

MAINTENANCE, 3.

WILL, 19.

ISSUE.

If separate legacies are given to two or more persons, with a limitation over to the survivor or survivors in case of the death of either without issue, the presumption *prima facie* is that the testator had not in his contemplation an indefinite failure of issue.

Where pecuniary legacies were bequeathed to several persons for their lives, and if any of them should die without issue, their proportions to be divided among the survivors, the sums were directed to be secured in Court, and the dividends paid to the legatees for their respective lives, with liberty to any person to

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apply upon the death of each legatee.

Whether such legatees took an absolute interest in their respective legacies, subject to an executory bequest over in case of their death leaving no issue, or whether they took an interest for life only, *quære.* *Ranelagh v. Ranelagh.* Page 441

JOINT-TENANCY.

A letter from *A.* to *B.*, in which *A.* engages to secure to *B.*'s family, in any way *B.* may desire by his will, a moiety of a fund in which *A.* and *B.* are interested as joint-tenants, is a severance of the joint-tenancy. *Gould v. Kemp.*

304

JUDGMENT.

1. *A.*, as assignee of *B.*, a bankrupt, gave an undertaking to *C.*, who was the mortgagee of one farm, and was under a contract to purchase another farm, both the property of the bankrupt, and who had a distress upon the mortgaged premises, that if the distress were withdrawn he would pay to *C.* the arrears then due in respect of the mortgage, out of the effects on the premises. *C.* withdrew the distress accordingly, and afterwards the bankruptcy was annulled before *A.* had obtained possession of any part of the bankrupt's effects; whereupon *C.* brought an action on the undertaking, and recovered judgment against *A.* personally: Held, on a bill filed by *A.* against *C.*, to

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which

which *B.* was no party, that *A.* could have no relief in equity against the judgment at law; and that he was not entitled, as against *C.*, to claim repayment of the sum thereby recovered out of the price which *C.* had contracted to pay for the other farm. *Pell v. Stephens.* Page 334

2. A court of equity has no jurisdiction to relieve a plaintiff against a judgment at law, where the case in equity proceeds upon a ground equally available at law and in equity; but the plaintiff must establish some special equitable ground for relief. *Harrison v. Nettleship.* 423

JURISDICTION.

1. The Court will not interfere in questions arising upon the practice of retainer.

A motion for an injunction to restrain a particular counsel, who had acted for the defendants, from acting, at a subsequent stage of the proceedings, on behalf of the plaintiffs from whom he had received a retainer, was refused. *Baylis v. Grout.* 316

2. If the misconduct of an officer of the Court, in executing its orders, becomes the subject of civil proceedings before another tribunal, the Court, in its discretion, may either itself take cognizance of the complaint, or may leave the matter to be dealt with upon such proceedings; but wherever the title to redress against such officer is founded on a denial of his authority, or on an

alleged defect in the order which he has executed, the Court (which alone is competent to decide upon the validity of its own orders), is bound to interpose by injunction, and assume exclusive jurisdiction over the matter of complaint. *Aston v. Heron.* Page 390

See CHARITY, 4, 5.

JUDGMENT, 2.

LACHES.

See RENEWALS, 3.

LAND TAX, REDEMPTION OF.

A. being under a settlement tenant for life in remainder, after prior estates for life and in tail, with remainder to his own first and other sons in tail, with an ultimate remainder in fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estate during the life of the first tenant for life, and took an assignment to himself under the Land Tax Act. The prior tenant for life afterwards died without issue, having devised to *A.* the ultimate fee; and *A.* being in a dying state, and having no issue, made his will, and devised the fee of the settled estate, without declaring any intention with respect to the land tax redeemed. The land tax at his death continues to be part of his personal estate. *Trevor v. Trevor.* 675

LAPSE.

A testator gave to the children of his sister, the late *E. W.*, whose names he

he enumerated, "or to their heirs," certain legacies. Three of the children died in the lifetime of the testator: Held, that the legacies to these children did not lapse, but that their next of kin took by substitution at the death of the testator. *Gettings v. M'Dermott*. Page 69

LEASE.

See RENEWALS.

SPECIFIC PERFORMANCE, 3.

LEGACY.

1. A legacy of 500*l.* a piece "to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship," does not include a child born after the testator's death. *Storrs v. Benbow*. 46
2. If separate legacies are given to two or more persons, with a limitation over to the survivor or survivors in case of the death of either without issue, the presumption *prima facie* is, that the testator had not in his contemplation an indefinite failure of issue.

Where pecuniary legacies were bequeathed to several persons for their lives, and if any of them should die without issue, their proportions to be divided among the survivors, the sums were directed to be secured in Court, and the dividends paid to the legatees for their respective lives, with liberty to any person to

apply upon the death of each legatee.

Whether such legatees took an absolute interest in their respective legacies, subject to an executory bequest over in case of their death leaving no issue, or whether they took an interest for life only, *quære*. *Ranelagh v. Ranelagh*. Page 441

See IMPLICATION.

WILL.

LIEN.

The estate of a tenant for life was charged with a sum of 25,000*l.* and interest from the time that the life estate commenced, and it was provided that the 25,000*l.* should not be raised until the expiration of two years from the commencement of the life estate. The tenant for life failed to keep down the interest of the 25,000*l.*, and there was raised on the estate by the trustees of the term created for the purpose of the charge a sum considerably exceeding the 25,000*l.* The persons entitled in remainder after the life estate have an equity to recoup, out of the future income which shall accrue to the tenant for life, the excess raised beyond the 25,000*l.*; and the tenant for life having taken the benefit of the Insolvent Debtors' Act, his assignees are affected by the same equity. *Waring v. Coventry*. 406

LUNATIC.

1. Where the next of kin of a deceased lunatic was of unsound mind,

mind, though not so found by inquisition, a transfer of the lunatic's personal estate was directed to be made to the person to whom administration *durante animi vitio* of such next of kin had been granted, agreeably to the practice of the Ecclesiastical Court. *Ex parte Evelyn*. Page 3

2. Where a sum of stock was bequeathed to a married woman, whose husband was of unsound mind, though no commission of lunacy had issued against him, the Court, on a bill filed by the husband and wife for payment of the legacy, transferred the fund into Court to the joint account of the plaintiffs; and afterwards, in consideration of the poverty of the parties, made an order, on the petition of the wife, that the dividends should be paid to her for her life. *Steed v. Calley*. 52

3. The trustees under a will, in which a life annuity of 6000*l.* a year, and other considerable benefits, were given to a person who at the death of the testator was confined in a lunatic asylum, filed a bill for the directions of the Court, in executing the trusts of the will relative to the lunatic. The wife of the lunatic presented a petition, praying an allowance out of the income given to the lunatic, and the Court thereupon referred it to the Master to inquire into his state of mind; and the Master having reported that he was of unsound mind, and not competent to the management of his affairs, the Court, upon the pe-

tition of the wife to confirm the report, directed the trustees to apply to the Great Seal for a commission of lunacy, and referred it to the Master to inquire what in the meantime would be a proper allowance to be made to the wife. *The Bishop of Exeter v. Lord and Lady Ward*. Page 54

4. The lunacy of a partner is not *ipso facto* a dissolution of the partnership, but is a ground for the dissolution, if the other partner or partners come to the Court for a decree of dissolution on the ground of such lunacy.

One of two partners having continued the partnership business for some time after the lunacy of the other, and having then sold the business, the representative of the deceased lunatic partner was held to be entitled to his share of the partnership profits up to the period of sale. *Jones v. Noy*. 125

MAINTENANCE.

1. Where a testator gave his real estates, and also his residuary property to his wife for life, with remainder to an infant great nephew for life; a statement in the will that it was his particular wish and request that his wife and the infant's grandfather would superintend and take care of the infant's education, so as to fit him for any respectable profession or employment, was held, under the circumstances, and upon the effect of the whole instrument, to charge the maintenance and education of the

the infant upon the interest taken by the testator's widow under the will. *Foley v. Parry*. Page 138

2. The Court will not direct an inquiry as to the propriety of an allowance to the father for the past maintenance of the infant, unless a special case be made. *Exparte Bond*. 439
3. If under a marriage contract, a fund has been settled upon trust for the children of the marriage, at twenty-one, with a proviso, that till their shares become payable, the interest shall be applied towards their maintenance; the father is entitled to receive such interest for that purpose, without reference to his own ability to maintain them. *Meacher v. Young*. 490
4. It is not maintenance to purchase an interest which is the subject of a suit; but if the purchaser give an indemnity against all costs that have been or may be incurred by the seller in the prosecution of the suit, the transaction amounts to maintenance.

Where, after decree in a creditor's suit, the plaintiff sold a debt which he had proved in the cause, and took from the purchaser a deed of indemnity against all expenses which he had incurred and might incur in the suit, and his name continued to be used as plaintiff in the suit, together with that of the purchaser; it was held, that this transaction amounted to maintenance, and the bill was, upon that ground, dismissed. *Harrington v. Long*. 590

MARRIED WOMAN.

See SEPARATE ESTATE.

MARSHALLING OF ASSETS.

1. Creditors by specialty, who are mere volunteers, are not entitled to compete with creditors on simple contract for valuable consideration, but as against the devisees of the debtor have a right to stand in the place of mortgagees who have exhausted the fund provided by the testator for the payment of debts. *Lomas v. Wright*. Page 769
2. A testator directed estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of the residue of his personal estate; and he gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children; and the testator afterwards, by a codicil, confined the residuary gift of the produce of the estates directed to be sold to his younger children: Held, first, that the devisees of the produce of the real estate directed to be sold were entitled to have the personal estate applied in payment of the mortgages; secondly, that pecuniary legatees were entitled to stand in the place of the mortgagees, against the estates so devised, to the extent to which the mortgages had been paid out of the personal estate; and, thirdly, that such

3 I 3 pecuniary

pecuniary legatees were not entitled to stand in the place of a vendor to the testator, part of whose purchase-money remained unpaid at the testator's death, to the extent to which his lien upon the estate sold had been satisfied out of the personal estate. *Wythe v. Henniker*. Page 635

MISCONDUCT OF OFFICER.

If the misconduct of an officer of the Court, in executing its orders, becomes the subject of civil proceedings before another tribunal, the Court, in its discretion, may either itself take cognizance of the complaint, or may leave the matter to be dealt with upon such proceedings; but wherever the title to redress against such officer is founded on a denial of his authority, or on an alleged defect in the order which he has executed, the Court (which alone is competent to decide upon the validity of its own orders) is bound to interpose by injunction, and assume exclusive jurisdiction over the matter of complaint. *Aston v. Heron*. 390

MISREPRESENTATION.

The plaintiff acting as solicitor of a banking firm, in order to prevent the taking out of circulation notes issued in the lifetime of the testator, who was at the head of the banking concern, induced the mother and guardian of the testator's heir to forego proceedings

to compel the application of the primary funds to the payment of the testator's debts in exoneration of certain descended estate, by representing that such proceedings were wholly unnecessary, and that the property primarily liable was abundantly sufficient for the payment of the testator's debts. The plaintiff afterwards filed a creditor's bill against *J. W.*, the executor and devisee of the testator, and against the heir, and upon the bankruptcy of *J. W.*, his assignees were brought before the Court by a supplemental bill: Held, that the plaintiff was entitled to the common decree against the personal and devised real estate of the testator; but the bill, as against the heir, was dismissed with costs. *Jones v. Waters*. Page 610

MORTGAGE.

1. Where an equitable security is given by the deposit of deeds, the plaintiff on a bill brought to give effect to his security is entitled to a decree for a sale. *Pain v. Smith*. 417
2. In the decree upon a bill by a an equitable mortgagee, the equitable mortgagor will be allowed six months to redeem the deposited deeds. *Parker v. Housefield*. 419

MOTIONS OF COURSE.

See ORDERS, NEW.

NE EXEAT REGNO.

Where a covenant in an agreement for a lease was broken, and a verdict

verdict obtained for 1500*l.* as damages for the breach, but the plaintiff in the action died before the judgment was perfected, so that the damages were lost at law, the Court, on a bill by his representatives for specific performance of the agreement, refused a writ of *ne exeat regno* for the amount. *Jenkins v. Parkinson*. Page 5

NET PROFIT.

The vendor of a trading concern guaranteed the net profit of the business sold, and of another business in which the purchasers were also engaged, at a certain specified sum: Held, that this guarantee applied to the profits made by the two concerns, after deducting the interest allowed on the amount of further capital advanced by the purchasers for the purpose of carrying on the concerns. *Kirkby v. Wright*. 131

NEW TRIAL.

Where the Judge who tried the issue stated that he was not dissatisfied with the verdict, though he should have found otherwise had he been himself upon the jury, the Court would not direct a new trial of the issue, if the application for a new trial rested solely upon the ground that the verdict was against the weight of evidence.

At the trial of an issue on a question of legitimacy, a witness was called to prove a fact, showing that there might have been

access between a husband and wife at a particular place and time. This witness had not been examined in a suit in the ecclesiastical court, to which the mother of the child whose legitimacy was disputed was a party, and in which his evidence would have been material to her; nor was any attempt made by her in that suit to establish the case of access, which his testimony went to make out. The testimony of this witness was a surprise upon the party against whom it was produced; and its accuracy being impeached by affidavits, the Court directed a new trial of the issue. *Gibbs v. Hooper*. Page 353

NEXT FRIEND.

See *INFANT*, 2.

NEXT OF KIN.

1. Where the next of kin of a deceased lunatic was of unsound mind, though not so found by inquisition, a transfer of the lunatic's personal estate was directed to be made to the person to whom administration *durante animi vitio* of such next of kin had been granted, agreeably to the practice of the Ecclesiastical Court. *Ex parte Evelyn*. 3
2. Where, on the failure of a particular gift to one for life, with remainders over, the next limitation in the deed was to the settlor, or such persons as he should appoint, and in default of appointment, to such person or persons as should at the time of

his death be his next of kin ; and the settlor died before the tenant for life, without having made any appointment : the tenant for life, who was one of the settlor's next of kin, was held not to be excluded from the benefit annexed to that character. *Elmsley v. Young*. Page 82

Affirmed on appeal. 780

3. The words "next of kin," used *simpliciter*, and without explanatory context, must be taken to mean next of kin according to the statute of distributions. *Elmsley v. Young*. 82

Reversed on appeal ; and held that "next of kin," used *simpliciter*, must be taken to mean "nearest of kin." 780

4. A testator gave his personal estate to trustees, upon trust to convert into money, and invest the same, and to pay the interest to his mother for her life ; and after the decease of his mother, he gave all his estate and effects to such person or persons as she should by her will direct and appoint ; and in case his said mother should die without a will, then to such person or persons as would be entitled to the same by virtue of the statute of distributions. The mother survived the testator, and died intestate : Held, that the testator's next of kin at the death of the mother were entitled to the bequest. *Briden v. Hewlett*. 90

ORDERS, NEW.

1. A party may take exceptions to the Master's report of impertinence at any time before the im-

pertinent matter is actually expunged ; and the practice in this respect is not altered by the twenty-second of the last new orders, which provides that impertinent matter shall not be expunged until the expiration of four days from the filing of the report, "in order that the adverse party may have an opportunity of filing exceptions to such report." *Evans v. Owen*. Page 82

2. The jurisdiction of the Court to make orders upon motions of course is not taken away by the operation of the 3 & 4 W. 4. c. 94. ss. 13. and 14. and the new orders founded thereupon. *Cullingworth v. Grundy*. 359

3. The twenty-first of the last new orders does not alter the former practice in respect of the third application for time, where the Master gives no special direction. *Judd v. Wartnaby*. 813

PARTIES.

A., one of the executors of the will of *B.*, who died in *India*, proved the will, and possessed the testator's assets in *India*. The widow and executrix of *A.* proved her husband's will, and possessed his assets in *India* ; and having afterwards come to *England*, she was made a party to a suit for the administration of *B.*'s estate : Held, that it was not necessary that an administrator of *A.*'s estate in *England* should be also a party to this suit. *Anderson v. Caunter*. 763

See COPYHOLD, 3.

PLEADING, 1.

PART-

PARTNERSHIP.

1. The lunacy of a partner is not *ipso facto* a dissolution of the partnership, but is a ground for the dissolution, if the other partner or partners come to the Court for a decree of dissolution on the ground of such lunacy.

One of two partners having continued the partnership business for some time after the lunacy of the other, and having then sold the business, the representative of the deceased lunatic partner was held to be entitled to his share of the partnership profits up to the period of sale. *Jones v. Nay.*

Page 125

2. The Court will not decree a dissolution of partnership, unless it be shown that the defendant has substantially failed in the performance of his part of the partnership agreement; it is not the office of a court of equity to enter into the consideration of mere partnership squabbles. *Wray v. Hutchinson.*

235

PEER.

Service of a *subpœna* to appear, and of an order for a sequestration *nisi*, upon a peer, at a time when he was beyond the jurisdiction, by leaving them at the peer's town residence, held, under the circumstances, to be good service. *Thomas v. Earl of Jersey.*

398

See Costs, 5.

PLEA.

A plea, that the title of the plaintiff accrued in 1759, and that the possession of the estates had been, ever since, adverse to the plaintiff and to the persons through whom he claimed, was over-ruled, because it did not state the particular facts on which the plaintiff meant to rely, as constituting the adverse possession; and, therefore, the plaintiff could not know what case he had to meet.

A plea of adverse possession to a bill charging that the defendant has in his custody documents showing the plaintiff's title, must be accompanied by an answer denying that charge. *Hardman v. Ellames.*

Page 732

PLEADING.

1. A man already married, performed the ceremony of marriage with *G. W.*, and joined with her in executing an assignment of her life interest in a trust fund to a purchaser. The fraud practised upon *G. W.* by the person acting in the character of her husband did not affect the validity of the assignment, nor was it necessary to make the supposed husband a party to a suit instituted by the purchaser to obtain the benefit of the assignment. *Sturge v. Starr.*

195

2. A plaintiff may by amended bill introduce new matter which occurred prior to filing the original bill, in order to fortify his case; but he cannot introduce new matter

matter

matter which occurred subsequently to the filing of the original bill, without a supplemental bill; and the defendant having in his answer to the amended bill stated this objection to the new matter, and insisted upon the same advantage as if he had demurred or pleaded thereto, and the plaintiff not being able to support his case upon the evidence which referred to the allegations of the original bill, the bill was dismissed with costs. *Wray v. Hutchinson*.

Page 235

3. Where a bill contains scandalous imputations on the character of the defendant, the defendant will not subject himself to the payment of costs by answering such imputations, although he objects at the same time to the introduction of the matters so answered on the ground of irregularity in point of pleading. *Wray v. Hutchinson*.

235

4. In a bill filed by the settlor for the purpose of setting aside the settlement, the mortgagee of her interest under the settlement joined as a co-plaintiff. He can obtain no relief in such a suit. *Bill v. Cureton*.

503

5. If a defendant in his answer states the effect of documents admitted to be in his possession, but for his greater certainty craves leave to refer to the documents themselves when produced, the plaintiff is entitled to an order for their production, although the answer positively swears that they form part of the defendant's title, and in no

way assist or make out the title of the plaintiff. *Hardman v. Elames*.

Page 732

6. *A.*, one of the executors of the will of *B.*, who died in *India*, proved the will, and possessed the testator's assets in *India*. The widow and executrix of *A.* proved her husband's will, and possessed his assets in *India*; and having afterwards come to *England*, she was made a party to a suit for the administration of *B.*'s estate: Held, that it was not necessary that an administrator of *A.*'s estate in *England* should be also a party to this suit. *Anderson v. Caunter*.

763

See COSTS, 6, 7.

POWER.

A testator bequeathed 2000*l.* consols to trustees, upon trust to pay the interest to his daughter *S.*, to her separate use, during her life; the principal to go to her heirs, or any other she might choose to will it to. *S.* married, and, by a deed in the *Scotch* form, and executed in *Scotland*, reciting the will, she granted and assigned the 2000*l.* consols, from and after her decease, to and in favour of her husband and his son by a former marriage: Held, that the words "to will it," meant to dispose of it by will, and that the disposition of the fund by the deed in the *Scotch* form was not a valid execution of the power. *Paul v. Hewetson*.

434

See WILL, 30.

PRAC-

PRACTICE.

1. The acts of 2 & 3 W. 4. c. 33. and 4 & 5 W. 4. c. 82. for effectuating the service of process issuing from the Courts of Chancery and Exchequer, extend to Scotland. *Cameron v. Cameron.* Page 289
3. Special injunction granted, under the circumstances, to stay process of outlawry, and all further proceedings at law against the plaintiff in equity, the Court requiring the plaintiff in equity to give judgment in the action, with stay of execution, to be dealt with as the Court should thereafter direct. *Drummond v. Pigou.* 168
4. It is consistent with the practice of the Court (though such practice is inconvenient and may require to be amended by a general order) that an *ex parte* order, obtained upon petition at the Rolls, may be discharged upon motion before the Lord Chancellor. *Eastwood v. Glenton.* 280
5. An order made as of course, upon petition at the Rolls, may, if irregularly or improperly obtained, be discharged upon motion before the Master of the Rolls.
An order for the taxation of an agent's bill cannot be obtained as of course by a solicitor; nor can the rule for bringing the amount of the agent's bill into Court, upon such application, be dispensed with except under special circumstances. *Lees v. Nuttall.* 284
6. The sheriff's return of a caption and rescue is a sufficient ground, without affidavit, for an absolute order of commitment for contempt.
Where a party previously in contempt for disobeying an order, is taken into custody and committed to the Fleet for a contempt in effecting a rescue, the custody shall be held to apply to both the contempts, and both must be cleared before the party can be discharged; and subsequent orders up to a sequestration, proceeding upon such commitment, are not vitiated because they refer to the original contempt only. *Blackwell v. Tallow.* Page 321
7. The Court will not order the serjeant-at-arms upon a return of *non est inventus* upon any other affidavit than that of the solicitor or his town agent, stating that due diligence has been used in endeavouring to apprehend the defendant, as required by 1 W. 4. c. 36. s. 1. The affidavit of the town agent, showing that he issued the writ, and of the sheriff's officer, shewing the steps taken by him to apprehend the defendant, and the manner in which his endeavours were eluded, will not be sufficient. *Pugh v. Pugh.* 358
8. If after replication filed, the plaintiff has on special leave amended his bill in such a manner as to call for an answer, he may afterwards obtain, as of course, a further order to amend at any time before the answer to the amended bill

- bill is put upon the file. *Wharton v. Swann.* Page 362
9. Service of a *subpœna* to appear, and of an order for a sequestration *nisi*, upon a peer, at a time when he was beyond the jurisdiction, by leaving them at the peer's town residence, held under the circumstances to be good service. *Thomas v. Earl of Jersey.* 398
10. Where an answer was reported insufficient, and the plaintiff obtained the common injunction, and also an order for liberty to amend, and that the defendant should answer the exceptions and amendments at the same time, a motion for the extension of the injunction to stay trial was refused. *Mellor v. Cresswell.* 616
11. An action brought after a decree, upon the subject-matter referred to the Master, and pending the proceedings in his office, will be restrained upon motion, by special injunction; and if a supplemental bill be filed, praying such injunction, it is not necessary to obtain in the first instance the common injunction. *Frank v. Basnett.* 618
12. The answer of the Lord Chancellor to a petition of appeal relates to the day on which the petition was presented.

Where, therefore, a petition of appeal was presented within twenty-eight days after notice had been given of a docket of the decree having been presented for signature, and, the Lord Chancellor being in *Scotland*, the petition was not answered until after

the expiration of the twenty-eight days, the enrolment of the decree was vacated. *Richards v. Wood.*

Page 621

See EXCEPTIONS, 1, 2.
ORDERS, NEW.

PRODUCTION OF BOOKS AND PAPERS.

1. Motion for the production of correspondence, referred to in the answer, between the solicitor of the defendants and a person not a party to the suit, refused. *Curling v. Perring.* 380
2. If a defendant in his answer states the effect of documents admitted to be in his possession, but for his greater certainty craves leave to refer to the documents themselves when produced, the plaintiff is entitled to an order for their production, although the answer positively swears that they form part of the defendant's title, and in no way assist or make out the title of the plaintiff. *Hardman v. Ellames.* 732

REDEMPTION.

See LAND TAX.

MORTGAGE, 2.

RENEWALS.

1. Where a testator provides a fund for the payment of fines on admission to copyholds, or on renewals of leases, the manner of raising the fines, and the question of contribution between the tenant for

for life and the remainder-man, must depend upon the intention of the testator, to be collected from the whole will. *Playters v. Abbott.* Page 97

2. Where the first trust of leasehold property held for lives and years is to pay the fines on renewals out of the rents and profits, and the next trust is for the benefit of those who in strict settlement take freehold and copyhold property under the same will, the expences of renewal are incidental to the leasehold property, and fall upon those who from time to time are entitled to the possession of it under the will. *The Earl of Shaftesbury v. The Duke of Marlborough.* 111

3. A testator devised a freehold estate to A. for life, with remainder to his first and other sons in tail male; and he directed that a church lease which he held for a term of twenty-one years, renewable every seventh year, should be regularly renewed by the persons successively possessing the freehold estate under his will, and be enjoyed together with the same. A. omitted to renew in proper time, and the lease expired in 1798. A.'s eldest son came of age in 1800, and thereupon joined with his father in suffering a recovery of the freehold estate. A. died in 1830, and in 1831 the son filed his bill, praying compensation for the loss of the lease out of his father's assets: Held, that there was no such laches or acquiescence on the part of the

plaintiff as to debar him of his equitable remedy. *Bennett v. Colley.* Page 225

RESIDUARY LEGATEE.

See WILL, 19.

RETAINER.

Under the common decree against an administrator, directing his intestate's assets to be applied in a due course of administration, the Master is not entitled to go into the consideration of transactions between the administrator and the other creditors which might affect the administrator's right of retainer for a debt due to himself. *Spicer v. James.* 387

See COUNSEL.

REVERSION.

See EXPECTANT HEIR.

REVOCATION.

See VOLUNTARY DEED, 2, 3, 4.
WILL.

SCANDAL.

Where a bill contains scandalous imputations on the character of the defendant, the defendant will not subject himself to the payment of costs by answering such imputations, although he objects at the same time to the introduction of the matters so answered on the ground of irregularity in point of pleading. *Wray v. Hutchinson.* 235

SECURITY FOR COSTS.

See COSTS, 5, 6, 7.

SE-

SEPARATE ESTATE.

1. It was stipulated in marriage articles, that monies in the funds, the property of the intended wife, should be for her sole and separate use, to all intents and purposes, as if she were sole and unmarried: Held, upon the death of the wife without issue and without having made any appointment of the property, that the husband was entitled to it as her administrator, and not her next of kin. *Proudley v. Fielder.* Page 57

2. A testatrix gave the interest of her residuary property to her two grand-daughters, who were both unmarried at the date of the will; and she directed that the interest should be for and under their sole control, the principal to be equally divided for the use of their surviving issue, and that *M. W.*, their mother, should have no control whatever over it. One of the grand-daughters, *E. W.*, married after the death of the testatrix, and her husband became insolvent: Held, that the words of the will did not indicate an intention to exclude the marital control, and that the legacy to *E. W.* passed to her insolvent husband's assignee.

Seemle, that, if the words had indicated an intention to give the interest of the property to the separate use of the grand-daughters, the legacy would still have passed to the assignee of the insolvent husband; for a gift to the separate use of an unmarried woman will not restrict her right of

disposing, in any manner, of the property given, and consequently of giving it, if she think fit, by the act of marriage, to her husband. *Massey v. Parker.* Page 174

3. By the marriage settlement of a widow, her property was assigned to two trustees, upon trust to invest and pay the dividends to her for her life for her own sole and separate use; and after her decease, upon trust to pay the fund to her daughter by her first husband, "for her own use and benefit." The daughter's husband, *F. H.*, who was one of the trustees of the settlement, became bankrupt: Held, that, on the death of the tenant for life, the assignee of *F. H.* was entitled to the fund, subject to the wife's equity for a settlement. *Kensington v. Dollond.* 184

4. A testatrix gave a legacy to a female for life; and, in case she married, then to be for her sole and separate use, without power of anticipation. A grant of an annuity charged on this legacy, and made before marriage, cannot prevail against the legatee after marriage. *Brown v. Pocock.* 189

5. A testator bequeathed leasehold property to his daughter for her own and sole use, free of control of any present husband, or any husband to come. The daughter was unmarried at the date of the will, and at the death of the testator. She married without a settlement; and, having shortly afterwards separated from her hus-

husband, she filed a bill against him, claiming to be entitled to the leasehold property bequeathed to her separate use: Held, that she was so entitled; and a conveyance to the plaintiff, to her sole and separate use, was directed accordingly. *Anderson v. Anderson.*

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SERJEANT AT ARMS.

See PRACTICE, 6, 7.

SETTLEMENT.

1. Where, on the failure of a particular gift to one for life, with remainders over, the next limitation in the deed was to the settlor, or such persons as he should appoint, and in default of appointment, to such person or persons as should at the time of his death be his next of kin; and the settlor died before the tenant for life, without having made any appointment; the tenant for life, who was one of the settlor's next of kin, was held not to be excluded from the benefit annexed to that character. *Elmsley v. Young*, 82. 780.
2. A man unmarried cannot recal a voluntary trust deed, which he executes for the benefit of future children; nor can he relieve himself from a provision in the conveyance to the trustee, under which the income of the trust property is to be paid to him at the discretion of a third person. *Petre v. Espinasse.* 496
3. A single woman, not immediately contemplating marriage, transfers

a sum of stock, to which she was absolutely entitled, to trustees, upon trust to pay the dividends to her until she should marry; and after her marriage, upon trust to pay the dividends to her separate use for her life; and after her decease to pay the same to her husband for his life, or until his bankruptcy; and after his decease or bankruptcy, in trust for the children of the settlor; and if no child, for such person or persons as she should by deed or will appoint; and in default of appointment, upon trust for her next of kin. The settlement is irrevocable. *Bill v. Cureton.* Page 503

4. Where a contract is made between persons domiciled in a foreign country, and in a form known to the law of that country, the Court, in administering the rights of parties under it, will give it the same construction and effect as the foreign law would have given to it.

If, therefore, a domiciled *Scotchman* would be held entitled, in *Scotland*, by virtue of a marriage contract executed there, and in the *Scotch* form, to receive whatever property accrued during coverture to his wife, this Court will enforce his right, as against any such property coming within its jurisdiction, and will not raise an equity for a settlement in favour of the wife, in opposition to the provisions of the contract. *Anstruther v. Adair.* 513

SEVER-

SEVERANCE OF JOINT-TENANCY.

A letter from *A.* to *B.*, in which *A.* engages to secure to *B.*'s family, in any way *B.* may desire by his will, a moiety of a fund, in which *A.* and *B.* are interested as joint-tenants, is a severance of the joint-tenancy. *Gould v. Kemp.*
Page 304

SOLICITOR.

1. A solicitor ought to have a special authority from his client for instituting a suit, but such authority need not be in writing. *Lord v. Kellett.* 1
2. A solicitor may practise in the name of an attorney as his agent in the courts of law; but an attorney-at-law cannot practise in the name of a solicitor as his agent in the courts of equity. *Hockley v. Bantock.* 437
See AGENT.

SPECIFIC PERFORMANCE.

1. Where a covenant in an agreement for a lease was broken, and a verdict obtained for 1500*l.* as damages for the breach, but the plaintiff in the action died before the judgment was perfected, so that the damages were lost at law, the Court, on a bill by his representatives for specific performance of the agreement, refused a writ of *ne exeat regno* for the amount. *Jenkins v. Parkinson.* 5

2. By a written agreement between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant agreed to purchase, upon the terms stated, a certain property called the *Leigh* estate; and by the same agreement the defendant agreed to sell, and the plaintiff agreed to purchase another estate, called the *Haresfield* estate; and it was not expressed that the two contracts were to be dependent on each other. The defendant was eventually unable to make a good title to the *Haresfield* estate: Held, that the plaintiff was entitled to a specific performance of the contract as to the *Leigh* estate.

Evidence *aliunde* was not admitted, to show that it was the real intention of the parties that the agreement should take effect on the basis of a mutual exchange. *Croome v. Lediard.* Page 251

3. Under special circumstances the plaintiffs, who had entered into an agreement with the defendants for a lease of thirty-one years, were decreed to accept a legal lease for twenty-one years, and a covenant for a further term of ten years, with compensation for the difference in pecuniary value. Although the bill was framed with a view to a different relief, yet, inasmuch as upon the whole statement of the bill such appeared to be the equity between the parties, the Court, in order to prevent future litigation, made the decree accordingly, under the prayer for general

general relief. *Hanbury v. Litchfield*. Page 629

See ALLOTMENT.

VENDOR AND PURCHASER.

STATUTES, CONSTRUCTION OF.

1. 7 G. 4. c. 57. s. 32. *Stuckey v. Drewe*. 190
2. 2 & 3 W. 4. c. 115. *Bradshaw v. Tasker*. *West v. Shuttleworth*. 220. 684
3. 2 & 3 W. 4. c. 33. 4 & 5 W. 4. c. 82. *Cameron v. Cameron*. 289
4. 1 W. 4. c. 65. s. 17. *In the matter of Evans*. 318
5. 3 & 4 W. 4. c. 19. s. 13 & 14. *Cullingworth v. Grundy*. 358
6. 1 W. 4. c. 60. *In the matter of the De Clifford estates*. 624
7. 3 & 4 W. 4. c. 94. *In the matter of Allen's Charities*. 627

STOCK.

A husband had, before making his will, transferred two sums of 4 per cent. and 5 per cent. stock, then forming the whole of his funded property, into the joint names of himself and his wife. By his will he gave the rents of his leasehold houses and the interest of all his funded property or estate of whatsoever kind, upon trust for his wife for life, and, after her decease, upon trust to pay divers legacies of 4 per cent. stock, the aggregate amount of which fell short by 50*l*. only of the amount of stock of that description so formerly transferred

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by him. He afterwards made some further purchases of 5 per cent. stock, taking the transfers in the joint names of himself and his wife, and died in her lifetime, leaving no funded property except the 4 per cents. and 5 per cents. before mentioned; exclusive of which, his assets were wholly insufficient to pay his legacies: Held, first, that all the sums of stock then standing in the joint names of the husband and wife, and whether transferred before or after the date of his will, became, by survivorship, the absolute property of the wife; secondly, that the will did not purport to dispose of the stock in terms sufficiently distinct and explicit to put the wife to her election. *Dummer v. Pitcher*.

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SUBPCENA, SERVICE OF.

1. The acts of 2 & 3 W. 4. c. 33. and 4 & 5 W. 4. c. 82., for effectuating the service of process issuing from the Courts of Chancery and Exchequer, extend to *Scotland*. *Cameron v. Cameron*. 289
2. Service of a *subpcena* to appear, and of an order for a sequestration *nisi*, upon a peer, at a time when he was beyond the jurisdiction, by leaving them at the peer's town residence, held, under the circumstances, to be good service. *Thomas v. Earl of Jersey*. 398

SUPPLEMENTAL BILL.

See AMENDMENT.

3 K

SUR-

SURVIVOR.

If separate legacies are given to two or more persons, with a limitation over to the survivor or survivors in case of the death of either without issue, the presumption *prima facie* is, that the testator had not in his contemplation an indefinite failure of issue.

Where pecuniary legacies were bequeathed to several persons for their lives, and if any of them should die without issue, their proportions to be divided among the survivors, the sums were directed to be secured in Court, and the dividends paid to the legatees for their respective lives, with liberty to any person to apply upon the death of each legatee.

Whether such legatees took an absolute interest in their respective legacies, subject to an executory bequest over in case of their death leaving no issue, or whether they took an interest for life only, *quære*. *Ranelagh v. Ranelagh*. Page 441

See EXECUTOR, 2.

STOCK.

TAXATION.

An order for the taxation of an agent's bill cannot be obtained as of course by a solicitor, nor can the rule for bringing the amount of the agent's bill into Court, upon such application, be dispensed

with except under special circumstances. *Lees v. Nuttall*. Page 284

TENANT FOR LIFE.

The estate of a tenant for life was charged with a sum of 25,000*l.* and interest from the time that the life estate commenced, and it was provided that the 25,000*l.* should not be raised until the expiration of two years from the commencement of the life estate. The tenant for life failed to keep down the interest of the 25,000*l.*, and there was raised on the estate by the trustees of the term created for the purpose of the charge a sum considerably exceeding the 25,000*l.* The persons entitled in remainder after the life estate, have an equity to recoup out of the future income which shall accrue to the tenant for life, the excess raised beyond the 25,000*l.*; and the tenant for life having taken the benefit of the Insolvent Debtors' Act, his assignees are affected by the same equity. *Waring v. Coventry*. 406

See CONTRIBUTION, &c.

LAND TAX.

RENEWALS.

TRADE.

See EXECUTOR, 4.

TRUSTEE, 2.

TRANSFER OF STOCK.

See STOCK.

TRUST.

TRUST.

Words of expectation in a will, not amounting to recommendation, will not create a trust. *Lechmere v. Lavie.* Page 197

See INFANT, 1.
TRUSTEE.

TRUSTEE.

1. A person named a trustee in a deed, who declines to accept the office, is in the situation of any other Defendant against whom a bill is dismissed, and can only have his costs as between party and party. *Norway v. Norway.* 278

2. If a trustee mixes trust funds with his private monies, and employs both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed. *Docker v. Somes.* 655

3. Where by the terms of a settlement it appears to be the intention of the parties that there should at all times be two trustees of the property comprised in the settlement, the appointment of a single trustee in the place of two original trustees, and the transfer by them of the trust property to such single trustee, is a breach of trust, and the original trustees are responsible accordingly. *Hulme v. Hulme.* 682

See VOLUNTARY DEED, 3.

VENDOR AND PURCHASER.

1. The vendor of a trading concern guaranteed the net profit of the business sold, and of another business, in which the purchasers were also engaged, at a certain specified sum: Held, that this guarantee applied to the profits made by the two concerns, after deducting the interest allowed on the amount of further capital advanced by the purchasers for the purpose of carrying on the concerns. *Kirkby v. Wright.* Page 131
2. By the same instrument, the plaintiff agreed to sell an estate to the defendant, and the defendant agreed to sell another estate to the plaintiff. The defendant, being unable to make a good title to his estate, resisted the performance of his agreement to purchase the plaintiff's estate, on the ground that the agreement was intended to take effect only on the basis of a mutual exchange, and he failed in that defence.

On a reference to inquire as to the plaintiff's title, the Master found that the plaintiff could make a good title; but he did not find that he could make such title before the filing of the bill, the consideration of the time at which the plaintiff's title could be made having been expressly excluded, at the hearing, from the terms of the reference: Held, that the Defendant was liable to the costs of investigating the title in the

Master's office. *Croome v. Le-diard*. Page 293

3. A purchaser, who had been three years in possession, and who had not paid the purchase-money on the ground that a good title had not been made out, was ordered either to pay the purchase-money within two months, or to give up possession. *Tindal v. Cobham*.

385

4. The Court will not upon motion determine whether several lots, forming part of one estate, and bought at the same sale by one purchaser, are or are not so intimately connected in use and enjoyment, that the failure of title as to one will furnish a defence against specific performance as to the rest. Such an objection raises a question of facts, which ought either to be put in issue upon the pleadings, or be the subject of investigation upon a special reference to the Master. *Casamajor v. Stode*.

722

See SPECIFIC PERFORMANCE.

WILL, 24.

VESTING.

Bequest to a female when and if she should attain twenty-one, to her sole and separate use; and in case of her death, leaving children, her share to go to her children: Held, to vest an absolute interest in the legatee on her attaining twenty-one. *Home v. Pillans*.

15

VOLUNTARY DEED.

1. A conveyance or payment made

to a creditor by a person in insolvent circumstances, upon such person's own motion, without any pressure or threat on the part of the creditor, or made colourably with a view to divert the property from other creditors, or made with a view to give a preference to a particular creditor, within three months before the imprisonment of the insolvent, is a *voluntary* conveyance or payment within the meaning of the 7 G. 4. c. 57. s. 32. *Stuckey v. Drewe*.

Page 190

2. A man unmarried cannot recall a voluntary trust deed, which he executes for the benefit of future children; nor can he relieve himself from a provision in the conveyance to the trustee, under which the income of the trust property is to be paid to him at the discretion of a third person. *Petre v. Espinasse*.

496

3. If property be conveyed by a debtor in trust for the benefit of creditors, who are neither parties nor privy to the deed, the deed merely operates as a power to the trustees to apply the property in payment of debts, and such power is revocable by the debtor.

Quære, Whether a communication by the trustees to the creditors of the fact of such a trust will not defeat the power of revocation by the debtor? *Acton v. Woodgate*.

492

4. A single woman, not immediately contemplating marriage, transfers a sum of stock, to which she was absolutely entitled, to trustees, upon

upon trust to pay the dividends to her until she should marry; and after her marriage, upon trust to pay the dividends to her separate use for her life; and after her decease to pay the same to her husband for his life, or until his bankruptcy; and after his decease or bankruptcy, in trust for the children of the settlor; and if no child, for such person or persons as she should by deed or will appoint; and in default of appointment, upon trust for her next of kin. The settlement is irrevocable. *Bill v. Cureton.* Page 503

WARREN, RIGHT OF.

See ALLOTMENT.

WILL.

1. Bequest to a female when and if she should attain twenty-one, to her sole and separate use; and in case of her death, leaving children, her share to go to her children: Held, to vest an absolute interest in the legatee on her attaining twenty-one. *Home v. Pillans.* Page 15
2. A testator gave a sum of 5000*l.* in the event of the death of his nephew *J. W.* without leaving issue, to be equally divided among all the brothers and sisters of *J. W.* who should be living at the time of his death, and the children then living of any of his brothers and sisters who should have previously departed this life, but so that the children of such deceased brother and sister should take only

the share which their parent would have taken if living:

Held, that a child of a brother of *J. W.*, which brother was dead at the making of the will, took no share of the 5000*l.* *Waugh v. Waugh.* Page 41

3. A legacy of 500*l.* a piece "to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship," does not include a child born after the testator's death. *Storrs v. Benbow.* 46
4. A testator in the first place directs the payment of his debts and legacies by his executors after named. He afterwards devises a real estate to his son *T. D.* in fee; and in a subsequent part of his will names *T. D.* and another person his executors, who both prove the will. The estate devised to *T. D.* not being a devise to the executors after named, is not charged with debts and legacies. *Warren v. Davies.* 49
5. A testator directs the produce of his real estate to be invested by his executors in their own names in 4 per cent. consols. He then directs them to transfer the 4 per cent. consols and 3 per cent. consols, then standing in his name, to the said account in their own names, and afterwards disposes of "the said 4 per cent. trust stock." This disposition, under the special provisions of the will, includes the

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3 per cent. consols which were standing in his name at the making of the will. *Jaques v. Johnson*.

Page 64

6. A testator gave to the children of his sister, the late *E. W.*, whose names he enumerated, "or to their heirs," certain legacies. Three of the children died in the lifetime of the testator: Held, that the legacies to these children did not lapse, but that their next of kin took by substitution at the death of the testator.

The same testator gave all the residue of his property "in equal shares to each of his sisters, *M. S.* and *S. G.*, and upon their deaths respectively to their heirs." Both sisters died in the lifetime of the testator: Held, that the next of kin of *M. S.* and of *S. G.*, living at the death of the testator, were entitled by substitution to the gift of the residue. *Gittings v. M'Dermott*.

69

7. A testator gave his real estates to his wife for life, and after her decease to his grand-daughter, the only child of his deceased daughter, her heirs and assigns; but in case she should die under twenty-one without issue, then over: Held, that the grand-daughter, who was the testator's sole heir at law, took at the death of the tenant for life, by descent, and not by purchase. *Manbridge v. Plummer*.

93

8. Where a testator provides a fund for the payment of fines on admission to copyholds, or on renewals

of leases, the manner of raising the fines, and the question of contribution between the tenant for life and the remainder-man, must depend upon the intention of the testator, to be collected from the whole will. *Playters v. Abbott*.

Page 97

9. Where a testator gave his real estates, and also his residuary property, to his wife for life, with remainder to an infant great nephew for life; a statement in the will that it was his particular wish and request that his wife and the infant's grandfather would superintend and take care of the infant's education, so as to fit him for any respectable profession or employment, was held, under the circumstances, and upon the effect of the whole instrument, to charge the maintenance and education of the infant upon the interest taken by the testator's widow under the will. *Foley v. Parry*.

138

10. A testator gave his personal estate to trustees, upon trust to convert into money, and invest the same, and to pay the interest to his mother for her life; and after the decease of his mother he gave all his estate and effects to such person or persons as she should by her will direct and appoint; and in case his said mother should die without a will, then to such person or persons as would be entitled to the same by virtue of the statute of distributions. The mother survived the testator, and died intestate: Held, that the testator's

tator's next of kin at the death of the mother were entitled to the bequest. *Briden v. Hewlett*. Page 90

11. A testatrix gave to *J. B.* and his wife, and the survivor of them, an annuity of 100*l.* during their respective lives, in case *J. B.* should become incapable to collect, or be discharged from collecting, the rents of a particular estate; the annuity to commence and become payable from the first quarter day after her decease, or after he should cease to collect the rents. The husband survived the testatrix, but died soon afterwards, having continued to receive the rents till his death. The wife is entitled to the annuity of 100*l.* for her life. *Brittain v. Fleming*.

147

12. If the general intention of a testator can be collected upon the whole will, particular terms used, which are inconsistent with that intention, may be rejected as introduced by the testator's mistake or ignorance of the force of the words used.

Where the latter part of a will is inconsistent with a prior part, the latter part will prevail. *Sheratt v. Bentley*.

149

13. A testatrix gave the interest of her residuary property to her two grand-daughters, who were both unmarried at the date of the will; and she directed that the interest should be for and under their sole control, the principal to be equally divided for the use of their surviving issue, and that

M. W., their mother, should have no control whatever over it. One of the grand-daughters, *E. W.*, married after the death of the testatrix, and her husband became insolvent: Held, that the words of the will did not indicate an intention to exclude the marital control, and that the legacy to *E. W.* passed to her insolvent husband's assignee.

Seemle, that, if the words had indicated an intention to give the interest of the property to the separate use of the grand-daughters, the legacy would still have passed to the assignee of the insolvent husband; for a gift to the separate use of an unmarried woman will not restrict her right of disposing, in any manner, of the property given, and consequently of giving it, if she think fit, by the act of marriage, to her husband. *Massey v. Parker*.

Page 174

14. By the marriage settlement of a widow, her property was assigned to two trustees, upon trust to invest and pay the dividends to her for her life for her own sole and separate use; and after her decease, upon trust to pay the fund to her daughter by her first husband, "for her own use and benefit." The daughter's husband, *F. H.*, who was one of the trustees of the settlement, became bankrupt: Held that, on the death of the tenant for life, the assignee of *F. H.* was entitled to the fund, subject to the wife's equity for a settle-

settlement. *Kensington v. Dol-*
lond. Page 184

15. A testatrix gave a legacy to a female for life; and, in case she married, then to be for her sole and separate use, without power of anticipation. A grant of an annuity charged on this legacy, and made before marriage, cannot prevail against the legatee after marriage. *Brown v. Pocock.*

189

16. Words of expectation in a will, not amounting to recommendation, will not create a trust. *Lechmere v. Lavie.*

147

17. Bequest of a residue to *D.* for life, with remainder to her daughter *L.*, if she should survive her mother and attain twenty-one; but, if not, then to such other children of *D.* as should be living at their mother's decease, and should attain twenty-one; and if all such other children of *D.* should die under twenty-one, then over to *M.*; *D.* survived her daughter *L.*, and her only other child attained twenty-one, but died in her lifetime: Held, that on the death of *D.* leaving no children, the bequest over to *M.* took effect. *Mackinnon v. Sewell.*

202

18. A bequest of residue "to my executors hereinafter named, to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble, equally between them," followed by the appointment of three persons as

executors, is a gift to those persons as a class in their official character; and, therefore, one having died in the lifetime of the testator, the whole residue vests in the two survivors. *Knight v. Gould.*

Page 295

19. The testator gave to each of certain infant nephews and nieces, by name, 400*l.*, "with compound interest at 5 per cent. per annum, from the day of their birth, to be settled on their marrying or attaining twenty-one years, whichever may first happen:" Held, that compound interest at 5 per cent. was to run on each of the legacies from the birth-days of the several legatees till their marriage or majority respectively, and not merely to the day of the testator's death.

A bequest of "my wines and property in *England*," held to pass the testator's property in *England* of every description, including money in the funds and at his banker's, debts, and arrears of a pension due to him, and not confined to property *ejusdem generis* with wines.

The testator desired that *A.*, *B.*, and *C.* might each enjoy, during life, the interest of 800*l.* sterling, the principal to devolve eventually to his residuary legatees. He directed the residue of his property to be divided into three equal parts, one part to each of his brothers and his sister; and if his brothers and sister should not survive him, or
leave

leave legal issue living at the testator's death, then their shares to devolve in equal proportions to the survivors, as well as the shares that might have been devised to their issue. The testator's estate was not sufficient to pay the legacies in full: Held, upon the death of one of the tenants for life, that an apportionment of the legacy of 800*l.*, set apart to answer her life-interest, fell into the residue, and was not given over to the residuary legatees in their individual character; and that the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund. *Arnold v. Arnold*.

Page 365

20. A testator bequeathed leasehold property to his daughter for her own and sole use, free of control of any present husband, or any husband to come. The daughter was unmarried at the date of the will, and at the death of the testator. She married without a settlement, and, having shortly afterwards separated from her husband, she filed a bill against him, claiming to be entitled to the leasehold property bequeathed to her separate use: Held, that she was so entitled; and a conveyance to the plaintiff, to her sole and separate use, was directed accordingly. *Anderson v. Anderson*.

427

21. A testator bequeathed 2000*l.* consols to trustees, upon trust to pay the interest to his daughter

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S., to her separate use, during her life; the principal to go to her heirs, or any other she might choose to will it to. *S.* married; and, by a deed in the *Scotch* form, and executed in *Scotland*, reciting the will, she granted and assigned the 2000*l.* consols, from and after her decease, to and in favour of her husband and his son by a former marriage: Held, that the words "to will it," meant to dispose of it by will, and that the disposition of the fund by the deed in the *Scotch* form was not a valid execution of the power. *Paul v. Hewetson*.

Page 494

22. The testator began his will by directing that all his just debts, funeral and other incidental expenses, should be paid with all convenient speed after his decease. By a codicil he devised a particular estate, upon trust, in the first place, to pay the annuity to his wife, and to apply the surplus to the payment of his simple contract debts: Held, that the real estate was not charged with the payment of debts.

Quære, — Whether the introductory words, without more, would have charged the real estate? *Douce v. Lady Torrington*.

600

23. A testator, after a specific bequest of part of his personal estate, devises all his freehold, copyhold, and leasehold estates, and all the residue of his personal estate and effects, after payment of his just debts and funeral expenses,

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penses,

penses, to trustees, their heirs, executors, and administrators, upon certain trusts. The real estate is charged with the payment of debts. *Withers v. Kennedy*.

Page 607

24. A testator directed estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of the residue of his personal estate; and he gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children; and the testator afterwards, by a codicil, confined the residuary gift of the produce of the estates directed to be sold to his younger children: Held, first, that the devisees of the produce of the real estate directed to be sold were entitled to have the personal estate applied in payment of the mortgages; secondly, that pecuniary legatees were entitled to stand in the place of the mortgagees, against the estates so devised, to the extent to which the mortgages had been paid out of the personal estates; and, thirdly, that such pecuniary legatees were not entitled to stand in the place of a vendor to the testator, part of whose purchase-money remained unpaid at the testator's death, to the extent to which his lien upon the estate sold had been satisfied out of the personal estate. *Wythe v. Henniker*.

635

25. A testatrix directed several sums to be paid to certain Roman Catholic priests and chapels, desiring that they might be paid as soon as possible after her decease, that she might have the benefit of their prayers and masses; and she gave the residue of her property to trustees, upon trust, to pay 10*l.* each to the ministers of certain specified Roman Catholic chapels, for the benefit of their prayers for the repose of her soul, and that of her deceased husband, and to appropriate the remainder in such way as they might judge best calculated to promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of *Swale Dale* and *Wenston Dale*: Held, that the gifts to priests and chapels were void, and that the next of kin was entitled to the benefit of the failure; but that the gift of the residue was valid within the 2 & 3 IV. 4. c. 115. *West v. Shuttleworth*.

Page 684

26. When a testator limits his residuary property to one for life, with remainders over, it is *primæ facie* to be intended that the testator means that the property which is given to the tenant for life is to pass to those entitled in remainder; and if any part of the property be of a wasting nature, as long annuities, or leasehold, it must be immediately sold and converted into permanent property, unless, upon the whole context of the will, it shall appear that

that the testator had not that intention.

Where the testator gave the residue of his estate, real and personal, to his executors upon trust, to permit his wife to receive the rents, profits, and annual proceeds thereof to her sole use during her life, and after her decease upon trust to sell his freehold house in *Oxford Street*, and also his leasehold houses, by auction; and the testator desired that *E. A.* should be employed as auctioneer, to convert the whole of his estate into money for the purposes therein mentioned: it was held, that the widow was entitled to enjoy for her life the income of the testator's long annuities. *Alcock v. Slopier.* Page 699

27. A testator gave to his wife all and every part of his property, in every shape, and without any reserve, for her life; and at her death the property so left to be divided, one half among certain persons mentioned, the other half to be at the sole disposal of his wife. Part of the testator's property was leasehold: Held, that the persons to whom a moiety of the testator's property was given over were not entitled to have the leasehold property sold, but that the widow was entitled to enjoy it for her life. *Collins v. Collins.* 703

28. If upon the whole will it plainly appear that the testator meant to pass leasehold property under the description of real estate, the

Court will give effect to his intention. *Goodman v. Edwards.*

Page 759

29. A testator cannot by a will duly executed reserve to himself a power to charge his real estate for the payment of legacies, or for any other purpose, by an unattested codicil. *Whytall v. Kay.* 765

30. A testator devised his real estates to his first cousin, *Thomas Pearce*, for life; and after *T. P.*'s decease, he devised all his estates, as well real as personal, to such of his the testator's relations of the name of *Pearce*, being a male, as *T. P.* should by deed or will appoint; and in default of such appointment, to such of his the testator's relations of the name of *Pearce*, being a male, as *T. P.* should approve of or adopt, if he should be living at the death of *T. P.*, and his heirs, executors, &c. And in case *T. P.* should not adopt any such male relation, or no such male relation should be living at the death of *T. P.*, then to the next and nearest relation or nearest of kin of him the testator of the name of *Pearce*, being a male; or the elder of such male relations in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, executors, administrators, or assigns, for ever.

The testator had a brother *Z.*, who had gone to sea, and had not been heard of for many years; and, supposing *Z.* to have died without

END OF THE SECOND VOLUME.

